92-1401

Supreme Court, U.S.
FILED
FEB 17 1993
OFFICE OF THE CLERK

No. 92-___

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF HAWAII,

Petitioner,

vs.

FERDINAND Q. QUINO,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of the State of Hawaii erred in reversing the conviction of Respondent, Ferdinand Q. Quino (hereinafter "Respondent"), by misapplying this Court's rulings in *United States v. Mendenhall*, 446 U.S. 544 (1980), and its progeny, to erroneous facts, and in ruling Honolulu Police officers' approach and questioning of individuals in a public airport as a part of a routine and ongoing police investigation program regarding the importation of illegal drugs constituted a "seizure" of Respondent in violation of the Fourth Amendment of the *United States Constitution* and Article I, Section 7 of the *Constitution of the State of Hawaii*?

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of Hawaii, (hereinafter "Petitioner") respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Hawaii (hereinafter "Hawaii Court") entered in the above-entitled proceeding on October 28, 1992, as amended November 19, 1992, on the denial of the motion for reconsideration hereinafter "Opinion").

Petitioner advises the Court that there remains pending a related case before the Circuit Court of the First Circuit of the State of Hawaii, wherein co-defendant Henry Tugcay Galinato (hereinafter "Galinato") seeks post-conviction relief, claiming that he had been deprived

of the effective assistance of appellate counsel when appellate counsel failed to join in the successful application for writ of certiorari filed by Respondent with the Hawaii Court, which is the subject of the instant Petition. See Appendix ("App.") "A", attached, at 8a n.6.[1]

OPINIONS BELOW

The Opinion of the Hawaii Court is to be published but has not yet been reported in either the Hawaii or regional reporters and is reprinted in App. "A".

The opinion of the Intermediate Court of Appeals of the State of Hawaii (hereinafter "Intermediate Court") was to be published when issued but was subsequently depublished by the October 30, 1992 order of the Hawaii Court, and is reprinted in App. "B". See also App. "J".

JURISDICTION

The Opinion of the Hawaii Court was entered on October 28, 1992, and a timely motion for reconsideration was filed by Petitioner on November 9, 1992, and denied on November 19, 1992. App. "C"and "D", attached. The time in which this Petition may be filed extends to and includes February 17, 1992, and this Petition is timely. Jurisdiction in this Court is invoked under 28 U.S.C. Sections 1254(1) (1988) and 28 U.S.C. §1257(a) (1988).

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[1] Galinato and co-defendant Raul Centorna Cachola are not parties to the application for writ of certiorari filed by Respondent in the Hawaii Court, but are listed as parties to the Opinion which is the subject of the instant Petition. See App. "A" at 11a n.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the *United States Constitution* provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

Article I, Section 7 of the *Constitution of the State of Hawaii* provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized or the communications sought to be intercepted.

STATEMENT OF THE CASE

This case arises out of Respondent's conviction of a felony drug offense. App. "A" at 4a. The facts regarding Respondent's arrest are as follows:

On April 3, 1990 at about 10:45 p.m., plainclothes Honolulu police officers Tanya Tano ("Tano") and Harold Sumaoang ("Sumaoang"), both assigned to the narcotics-

vice detail at the Honolulu International Airport, were monitoring passengers arriving from San Jose, a city police had identified as a narcotics "source city". App. "B" at 27a.

The Honolulu Police Department trains its officers as follows. The officer first observes passengers arriving from an illegal drug "source city," then approaches a passenger at random and identifies himself as a police officer. The officer then asks the passenger if he would agree to talk to him. The officer then asks whether the passenger has disembarked from the targeted flight. If the passenger agrees, the officer asks for the passenger's identification and airline ticket. The officer asks if the passenger is carrying any narcotics, and upon receiving a negative answer, the officer requests "consent" to search the passenger's carry-on and check-in luggage. The officer then asks the passenger whether he has any narcotics on his person and requests "consent" to pat down the passenger. App. "A" at 5a-6a.

Tano and Sumaoang observed Respondent, Galinato and a third co-defendant, Raul Centorna Cachola (hereinafter "Cachola"), arrive together at the airport. App. "C" at 44a. As the three walked in single file past Sumaoang and Tano, the officers' attention was drawn to an unnatural bulge near the middle of Galinato's back under his clothes, too high to be his belt line, and they decided to follow the three men. App. "C" at *Id.* Galinato stopped at a fork in the main concourse, began looking around, and looked at the flight arrival and departure boards located there. App. "A" at *Id.* People usually stopped there to read the boards. *Id.* While Quino and Cachola continued to walk past Galinato down the concourse, the officers decided to approach the three to speak with them. *Id.*

As Galinato stood at the boards, Sumaoang approached him, identified himself by name and as a Honolulu police officer and asked, "May I speak with you?", and Galinato said he could. App. "C" at 44a-45a. Sumaoang did not block Galinato's path in any way. *Id.*

As Respondent and Cachola had walked past Galinato, Tano also walked past them and followed Respondent and Cachola for some distance, until she approached Respondent on his left, showed him her badge and identified herself, as they continued walking. App. "C" at 45a. Cachola moved ahead of them and stopped in their path facing Tano and Respondent, causing them to stop walking. *Id.*

Tano spoke with Respondent and Cachola while Sumaoang spoke with Galinato, but both officers generally asked each party the same questions. App. "B" at 28a. Each officer asked his or her respective party or parties whether they had just arrived on the American Airlines flight from San Jose, to which each party responded in the affirmative. *Id.* Each officer asked if the party or parties minded the officers' looking at their airlines tickets, at which point Respondent pointed to Cachola's hand-carry bag. *Id.* Cachola reached into the bag, his hand visibly shaking, retrieved three tickets, and handed two of them to Tano. *Id.*

The tickets were one-way from San Jose, purchased for $495.00 cash on the date of travel. App. "B" at 28a. Based on Tano's training and experience, she was aware that narcotics couriers frequently carried tickets purchased with cash on the date of travel from narcotics source cities. App. "C" at 46a.

Galinato took his ticket from Cachola and handed it to Sumaoang, who saw that the name on the ticket was "Nestor Calsada". App. "B" at 28a. The two tickets

handed to Tano by Cachola bore the names "Marino Quicho" and "Rudy Calsona". App. "C" at 46a. The officers then asked if they could see some kind of identification. *Id.* Cachola looked like he was panicking and Respondent said that he had not brought any identification with him. App. "B" at 28a.

While Tano was looking at the tickets, Respondent asked her what the inquiry was about, and Tano replied that the officers were investigating possible narcotics trafficking at the airport and liked to interview people arriving from certain flights. App. "B" at 28a. Respondent replied that he knew nothing about narcotics. *Id.*

From their actions, Tano was of the impression that Respondent and Cachola were panicking and wanted to run. App. "B" at 28a. Respondent again asked Tano what this was all about and again Tano explained. She then asked Respondent if he was carrying narcotics. *Id.* Respondent unzipped his bag, displaying its contents to Tano, and said that he was not carrying narcotics. *Id.* Tano asked Cachola if he was carrying narcotics, and Cachola answered no. App."B" at 28a-29a. Tano then asked Cachola if he minded her looking through his bag and Cachola handed Tano his unzipped bag, and Tano examined its contents. App."B" at 29a.

After looking through the bag, Tano returned the bag to Cachola, and asked him if he was carrying narcotics on his person. App. "B" at 29a. Cachola backed away from Tano and said no. *Id.* Tano then asked Cachola if she could pat him down. *Id.* At the same time, Sumaoang was asking Galinato whether he was carrying any illegal drugs and if he could pat Galinato down, to which Galinato nervously responded, "Give me a break." *Id.* Suddenly, all three began running down the concourse away from the officers toward the main ter-

minal; the officers chased after them shouting, "Stop. Police. Stop." *Id.* As they ran, Galinato removed a waistband from under his shirt with yellow and white packets attached to it and threw it into some potted plants and Respondent removed a yellow and white packet from under his shirt and also threw it into the potted plants. *Id.*

While Sumaoang was apprehending Respondent, they wrestled and the officer felt a waistband around Respondent's waist. App. "B" at 29a. Tano also wrestled with Cachola, and when Cachola's shirt tore, Tano observed a rubber belt around Cachola's stomach in the front portion of which Tano observed a plastic bag containing a crystal-like substance. *Id.*

In denying Respondent's motion to suppress evidence, the trial court decided that : (1) No reasonable suspicion was necessary for a police officer to approach an arriving passenger and converse with him; (2) Galinato, Respondent, and Cachola voluntarily consented to answer the police officers' questions; (3) Galinato, Respondent and Cachola were not in detention or custody during the questioning but were free to leave; and, (4) Galinato and Respondent abandoned, and therefore had no reasonable expectation of privacy in the items which they threw into the plants as they were running. App. "B" at 29a-30a.

The Intermediate Court affirmed Respondent's conviction, concluding that the actions of the officers would not have caused a reasonable person to believe that he was not free to leave, or would be physically restrained from leaving if he tried, and that under *Mendenhall*, the officers were not required to tell Respondent that he did not have to answer their questions and could leave. The Intermediate Court also decided that the trial court was

not clearly erroneous in finding that the officers did not, by word or act, command Respondent to do anything or not to do anything, had requested and obtained permission to do what they did, and had not physically restrained Respondent. App. "B" at 33a.

Respondent filed an Application for Writ of Certiorari with the Hawaii Court which was granted, resulting in the reversal of Respondent's conviction. In its Opinion of October 28, 1992, the Hawaii Court presented its own determination of the facts, specifically finding, "After observing the three men, [Tano and Sumaoang] approached and stopped them." App. "A" at 6a (emphasis added). However, this fact was not established by the record and was directly contrary to the facts as determined by the Intermediate Court. App. "B" at 27a-28a.

In its Opinion, the Hawaii Court also stated:

> Quino, however, argues that Officer Tano's approach and questioning of him at the airport was an unlawful and nonconsensual seizure of his person in violation of both the Fourth Amendment of the United States Constitution and article I, section 7 of the Hawaii Constitution. Although no physical force was used, Quino argues that the officers' show of authority and conduct communicated to him that he was not free to leave. He further contends that the incriminating evidence obtained after he fled was inadmissable as the product of an illegal seizure. We agree.

App. "A" at 9a-10a (emphasis added).

In explaining its decision, the Hawaii Court discussed the holdings of *Terry v. Ohio*, 392 U.S. 1 (1967), *United States v. Mendenhall*, 466 U.S. 544 (1980), and

California v. Hodari D., 499 U.S. ___, 111 S.Ct. 1547 (1991), commenting that in *Hodari D.*, this Court had refused to adhere to the *Mendenhall* "reasonable person" standard, relying instead on a common law definition of arrest by requiring either physical force or submission to the assertion of authority. App. "A" at 11a. The Hawaii Court then discussed its application of the *Mendenhall* standard in Hawaii cases, stating:

> Thus, we decline to adopt the definition of seizure employed by the United States Supreme Court in *Hodari D.* and, instead, choose to afford greater protection to our citizens by maintaining the *Mendenhall* standard.

App. "A" at 11a. The Hawaii Court then applied the *Mendenhall* decision to its determination of the facts to conclude ". . . that once the stop turned from general to inquisitive, a reasonable person in Quino's position would not have believed that he was free to ignore the officers' inquiries and walk away." App. "A" at 14a (emphasis added).

The Hawaii Court then applied the principles of *Florida v. Royer*, 460 U.S. 491 (1983) and *Florida v. Bostick*, 501 U.S. ___, 111 S.Ct. 2382 (1991), together with Hawaii case law to determine:

> [Q]uino did not voluntarily and intelligently agree to be detained. By approaching the group of men and failing to disclose that they were free to go at any time, the officers were concealing their investigative objective precisely to gain Quino's "consent." We note that the officers did not volunteer information that they were investigating drug trafficking at the

> time they announced their office. Consent based on such material nondisclosures can hardly be viewed as either voluntary or intelligent.

App. "A" at 16a (emphasis supplied). The Hawaii Court's finding that the officers had "concealed their investigative objective to gain Quino's 'consent'" was also unsupported by the record and inconsistent with the findings of both the trial court and the Intermediate Court.[2]

On November 9, 1992, Petitioner filed a motion for reconsideration with the Hawaii Court because Respondent had not been "stopped" by Tano, that Respondent's encounter with Tano was voluntary, and that in ruling that Tano had unconstitutionally "seized" Respondent, the Hawaii Court misapplied legal standards concerning what constituted a seizure under the Fourth Amendment pursuant to *Mendenhall, Royer, and Bostick*. App. "C" at 48a-62a.

On November 19, 1992, the Hawaii Court denied Petitioner's motion for reconsideration without hearing, comment or discussion. App. "D".

Accordingly, Petitioner is filing this Petition.

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[2] Petitioner is cognizant of this Court's rulings in *Michigan v. Long*, 463 U.S. 1032 (1983) and its progeny. Petitioner submits that the Hawaii Court's Opinion does not rest on adequate and independent state grounds. It fairly appears that the Hawaii Court's decision rests on federal law, as the Hawaii Court's Opinion interprets both the Fourth Amendment and the Hawaii Constitution based on its understanding of federal constitutional considerations. Thus, federal grounds are inextricably interwoven with state grounds in the Hawaii Court's interpretation of the Hawaii Constitution.

REASONS FOR GRANTING THE WRIT

The Hawaii Court has concluded that, under the Fourth Amendment of the *United States Constitution* (hereinafter "Fourth Amendment") and Article 1, §7 of the *Constitution of the State of Hawaii* (hereinafter "Hawaii Constitution"), police officers can no longer even approach a member of the public "... without any objective basis for suspecting them of misconduct ..." App. "A" at 17a. However, this conclusion reflects, and is the result of a misapprehension of both the facts of this case as reflected in the record and the appropriate legal standards enunciated in *Mendenhall* and subsequent decisions, as they apply to the instant facts and for this reason, Petitioner seeks review of the Opinion. Moreover, the Opinion was based on facts which were unsupported by the record. Thus, the Hawaii Court erroneously expanded the scope of protections available through the Fourth Amendment and the Hawaii Constitution in encounters between police and others during a routine police investigation regarding the importation of illegal drugs from drug source cities through the Honolulu International Airport.

I. This Court Should Grant Review to Correct the Hawaii Court's Overexpansive Application of the Fourth Amendment, Resulting From the Hawaii Court's Misapplication of Law to Misapprehended Facts.

At no time during their encounter, did the officers "stop" or "seize" Respondent or his companions. Tano and Sumaoang did not physically stop Respondent or his companions upon initiation of their encounter and the totality of the circumstances does not support the Hawaii

Court's conclusion that Respondent had been "seized" in violation of the Fourth Amendment.

The Hawaii Court began its analysis with a factual determination unsupported by the record.

First, the Hawaii Court states in its facts, "After observing [Quino, Galinato and Cachola], both [Sumaoang and Tano] approached and stopped them." App. "A" at 6a. However, the record below establishes that Galinato had stopped walking along the airport concourse on his own when he was approached by Sumaoang who identified himself and asked Galinato for permission to speak with him. When Tano first approached Respondent, she did not cause Respondent to cease in his movements. Rather, Tano and Respondent continued to walk and converse until Cachola stepped in front of them and and stopped them. Thus, the Hawaii Court commenced its legal analysis with a false and entirely unsupported assumption that the officers physically stopped Respondent and his two companions upon approaching them.

Second, without having had the opportunity to hear the officers' testimony and assess their credibility and without support in the record, the Hawaii Court imposed upon the officers a dishonest motive, labelling as a "material nondisclosure" the fact that the officers did not inform Respondent and companions that they were investigating narcotics trafficking when they first identified themselves to the three men, stating also:

> By approaching the group of men and failing to disclose that they were free to go at any time, the officers were concealing their investigative intent precisely to gain [Respondent's] "consent".

App. "A" at 16a (emphasis added). This was also contrary to the determination of the trial court, who viewed the live testimony of the officers and determined that there was no evidence presented which negated the consent of Respondent and his companions. App. "K" at 131a. Nor did the Hawaii Court rule the trial court's findings clearly erroneous.

The Hawaii Court entered into its legal analysis presuming, without support in the record that a physical stop had been effectuated by the officers and that at the time the officers did so, they harbored a dishonest motive, to somehow trick Respondent and his companions into talking with them, thus, improperly substituting its own view of the evidence for findings of the trial court and the Intermediate Court, both of which were sustained by the record. *See Mendenhall, supra* U.S. 557 ("[B]ecause the trial court's finding was sustained by the record, the Court of Appeals was mistaken in substituting for that finding its own view of the evidence. (citation omitted).") The Hawaii Court then applied a misapprehended legal standard to those facts to improperly expand the reach of the Fourth Amendment.

In its Opinion, the Hawaii Court cited with approval and accepted the basic legal principles set out in *Royer, supra* at U.S. 491 (1983) (a law enforcement officer does not violate the Fourth Amendment by merely approaching a person at random in a public place, by asking him if he is willing to answer some questions, by asking him questions if he is willing to listen, or by putting forth in evidence during a subsequent criminal proceeding the answers to those questions), and *Bostick*, 501 U.S. ___, 111 S.Ct. 2382 (1991) (the Fourth Amendment permits officers to approach individuals at random at airports to ask questions and request consent to search luggage so

long as a reasonable person understands that he can refuse to cooperate.) App. "A" at 15a. The Hawaii Court also acknowledged that a police officer has no affirmative duty to specifically inform a subject who has been approached that he or she is free to leave. App. "A" at 16a.

The Hawaii Court further cites with apparent approval as the applicable standard in the instant case, the "reasonable person" test of *Mendenhall, supra* at U.S. 554 ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would believe that he is not free to leave.")(emphasis added).) App. "A" at 10a-11a. In *Mendenhall*, also an airport "walk and talk" case, this Court discussed at length the kinds of police conduct which may lead a reasonable person to believe he is not free to leave the encounter, such as, the use of physical restraint by the officer to prevent a person from leaving including touching the person, the presence of several officers, the use of either tone or language by the officer during questioning which may have been overbearing or harassing, and the use of threats or the display of weapons.

However, the Hawaii Court has failed to properly apply the *Mendenhall* standard, erring in three ways.

First, the record in the instant case establishes that none of those indicia of a "seizure" referred to in *Mendenhall* were present in the instant case. The officers did not touch or physically restrain Respondent or his companions during their encounter. The officers did not create an intimidating environment by their numbers as there were only two officers present while Respondent and companions numbered three. They were in a public place among other members of the public. Neither offi-

cer, by tone or language, was in any way harassing or overbearing during their questioning of Respondent or his companions. In short, the objectively observable indicia of a "seizure" described by this Court in *Mendenhall* are absent, in this case.

Second, in applying the objective "reasonable person" standard, the Hawaii Court looked at what a person in Respondent's position would have believed. App. "A" at 14a. The Hawaii Court analyzed the effect of the officers' conduct from Respondent's subjective perspective although, at the time of his encounter with the officers, Respondent was knowingly in possession of felony quantities of illegal narcotics.

However, this Court expressly excluded from the "reasonable person" analysis the subjective beliefs of the person being approached, particularly where, as in this case, that person was in fact participating in criminal conduct at the time of the approach.

> We do reject, however, Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the "reasonable person" test presupposes an innocent person.

Bostick, supra at 115 S.Ct. ___; *see also Royer, supra* at U.S. 519 n.4 (1983); *accord Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) ("This 'reasonable person' standard also insures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.") Notwithstanding this Court's rulings, in determining the scope of Fourth Amendment protections, and that of the Hawaii

Constitution, the Hawaii Court virtually ignored this Court's expressed exclusion of subjective considerations from the *Mendenhall* analysis, while at the same time purporting to rely on *Mendenhall*, by ruling that ". . .a reasonable person in Quino's position would not have believed that he could ignore the officer's inquiries and walk away." App. "A" at 21a (emphasis added).

Third, the *Mendenhall* standard consists not only of the *Mendenhall* decision itself, but also of those subsequent opinions of this Court explaining and clarifying that decision, including *Hodari D.* However, in applying the *Mendenhall* standard, the Hawaii Supreme Court expressly rejected *Hodari D.*, resulting in an analysis of the Fourth Amendment which was, at best, intellectually tortuous.

In *Hodari D.*, this Court stated:

> The word "seizure" readily bears the meaning of laying on of hands or application of physical force even when it is ultimately unsuccessful . . . It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure . . . An arrest requires either physical force (as described above) or, where that is absent, submission to the assertion of authority.

Hodari D., supra at 111 S.Ct. ___.

This Court also explained *Mendenhall*, in relation to *Hodari D.*, by stating:

> Respondent contends that his position is sustained by the so-called Mendenhall test, formulated by Justice Stewart's opinion in United States v.

> Mendenhall, 446 U.S. 544, 554, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980), and adopted by the Court in later cases . . . "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." . . . In seeking to rely upon that test here, respondent fails to read it carefully. It says that a person has been seized "only if," not that he has been seized "whenever"; it states a necessary, but not a sufficient condition for seizure effected through a "show of authority." *Mendenhall* established that the test for the existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.

Hodari D., supra at 111 S.Ct. ___ (citations omitted).

While the application of the "show of force" test was the basis of its decision in *Michigan v. Chesternut, supra*, (a police cruiser's slow following of the defendant did not convey to the defendant that he was not free to disregard the police), in *Hodari D.*, this Court further explained:

> We did not address in Chesternut, however, the question whether, if the Mendenhall test was met - if the message that the defendant was not free to leave had been

> conveyed - a Fourth Amendment seizure would have occurred.

Hodari D., supra.

In *Hodari D.*, officers on patrol saw a group of youths including the defendant in a high-crime area around a car. When the youths saw the officers, they ran away. One officer pursued the defendant ordering him to stop. The defendant did not stop and during his flight disposed of an item later determined to be illegal narcotics, after which the officer apprehended the defendant by tackling him. This Court then determined:

> In sum, assuming the [the officer's] pursuit in the present case constituted a "show of authority" enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled.

Hodari D., supra 111 S.Ct. ___.

Thus, in *Hodari D.*, this Court clarified that the *Mendenhall* "show of authority" requirement was a threshold requirement for the determination of whether there had been a "seizure" and not an exclusive determinant. But, by rejecting *Hodari D.*, the Hawaii Court applied only half this Court's ruling, conducting only half of the necessary analysis, to determine whether there had been a "seizure" requiring constitutional protections in this case.

Had the Hawaii Court properly completed its analysis, it would have reached the opposite result. As previously discussed herein, Tano and Sumaoang did not exhibit a "show of authority" in their questioning and approach of Respondent and his companions. However, even if such a show had been demonstrated, in the instant case, under *Hodari D.*, because Respondent fled, there

was no seizure until Respondent was actually apprehended. Moreover, as in *Hodari D.*, because Respondent abandoned the illegal narcotics prior to his apprehension, the narcotics thus abandoned by Respondent should not have been suppressed.

Further, because the Hawaii Court relied upon this Court's decisions as controlling authority in interpreting the Hawaii Constitution, the Hawaii Court must be required to apply such legal authority properly and completely. Thus to the extent that the Hawaii Court erroneously interpreted *Mendenhall* while relying upon it, this case should be reversed and remanded to allow the Hawaii Court to properly apply the *Mendenhall* standard to the facts of this case, without substituting its view of the evidence which is unsupported by the record, for the findings of the trial court and the Intermediate Court which are sufficiently grounded in the evidence.

II. This Court Should Grant Review to Correct the Hawaii Court's Opinion Because, in its Analysis, the Hawaii Court Failed to Balance the Needs of Law Enforcement to Effectively Function For the Safety of All, With the Applicability of Fourth Amendment Protections.

By determining that a police officer can never approach citizens in a public area "without an objective basis for suspecting them of misconduct." (App. "A" at 17a), the Hawaii Court is, in effect, requiring that whenever police officers possess a need or desire to initiate an encounter with a private individual they must be prepared to seize him or else do nothing. Such an approach virtually ignores the needs of law enforcement, needs

which have been traditionally considered in search and seizure analyses.

In *Mendenhall*, this Court balanced the needs of law enforcement with those of the citizenry:

> [C]haracterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unresolved. In short, the security of all would be diminished. [Citations omitted.]". . .

Mendenhall, *supra* at U.S. 544, 554 (citations omitted).

As a matter of fairness and common sense, the total absence of such a balancing by the Hawaii Court in interpreting the scope of the Fourth Amendment and the Hawaii Constitution, precludes a proper decision concerning what is or is not "reasonable" under a particular set of circumstances. Because this process was ignored by the Hawaii Court in its analysis, the Opinion is, in effect, incomplete and an incorrect application of the law as determined by this Court to the facts in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and ultimately reverse the Opinion and remand this case to the Supreme Court of the State of Hawaii for a correction of its Opinion and Judgment.

Dated at Honolulu, Hawaii:

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII, Respondent-Appellee, v.
FERDINAND Q. QUINO, Petitioner-Appellant,
and HENRY TUGCAY GALINATO and
RAUL CENTORNA CACHOLA, Defendants.

NO. 15239

CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS

(CRIMINAL NO. 90-0721)

October 28, 1992

LUM, C.J., MOON, KLEIN, LEVINSON, JJ.,
AND RETIRED JUSTICE HAYASHI, ASSIGNED BY
REASON OF VACANCY

SEARCHES AND SEIZURES — in general — what constitutes search or seizure.

CONSTITIONAL LAW — constitutional guarantees in general — article I, section 7 of the Hawaii Constitution.

Hawaii has chosen to afford greater protection to its citizens by rejecting the United States Supreme Court's requirement that physical force

or submission to an assertion of authority determines whether a person has been seized.

SEARCHES AND SEIZURES — in general — what constitutes search or seizure.

CONSTITUTIONAL LAW — constitutional guarantees in general — article I, section 7 of the Hawaii Constitution.

A person is seized, if given the totality of the circumstances, a reasonable person would have believed that he was not free to leave.

SEARCHES AND SEIZURES — in general — what constitutes search or seizure.

CONSTITUTIONAL LAW — constitutional guarantees in general — article I, section 7 of the Hawaii Constitution.

A police officer cannot randomly encounter individuals without any objective basis for suspecting them of misconduct and then place them in a coercive environment in order to develop reasonable suspicion to justify their detention.

SEARCHES AND SEIZURES — in general — waiver and consent — validity of consent.

CONSTITUTIONAL LAW — constitutional guarantees in general.

A waiver of one's constitutional rights must be freely, voluntarily and intelligently undertaken.

SEARCHES AND SEIZURES — in general — waiver and consent — validity of consent.

The government has the burden to show that the waiver was voluntary and uncoerced.

SAME — same — same.

A police officer has no affirmative duty to inform a person approached for questioning that the person is free to leave the encounter at any time; however, failure to inform is a factor to be considered in evaluating whether consent was voluntarily given.

SAME — same — same.

Under circumstances where a police officer approaches a person and conceals his or her investigative objective to gain the person's consent and does not volunteer information that the officer is investigating drug trafficking at the time the officer announces his or her office, consent based upon such material nondisclosures cannot be viewed as either voluntary or intelligent.

SAME — same — same.

The police cannot rely on a person's acquiescence to establish that the person voluntarily consented to the seizure of his or her person.

OPINION OF THE COURT BY KLEIN, J.

Defendant-Appellant Ferdinand Q. Quino (Quino) was convicted of promoting a dangerous drug in the first degree in violation of Hawaii Revised Statutes (HRS) § 712-1241(1)(a)(i) (Supp. 1991). The circuit court denied Quino's pre-trial motion to suppress evidence. Subsequently, Quino was found guilty by a circuit court jury and sentenced to incarceration for a term of twenty years. On appeal before the Intermediate Court of Appeals (ICA), Quino argued that the circuit court should have granted his motion to suppress, because the evidence recovered was the product of an illegal seizure. The ICA affirmed the conviction in a published opinion. *See State v. Quino*, No. 15239 (Haw. App. May 7, 1992). This court granted Quino's petition for a writ of certiorari to review the ICA's opinion.

Quino's petition raises five issues; however, we confine our review to the following points: (1) whether Quino was "seized" by the police when Officer Tanya Tano (Officer Tano) approached and questioned him in the airport terminal; and (2) assuming a seizure occurred, whether it was consensual. Because we conclude that an unlawful seizure occurred prior to Quino's flight, it is unnecessary to address the remaining issues.[1]

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[1] The third point raised on appeal was whether Officer Tano had reasonable suspicion to believe that criminality was foot prior to detaining Quino. The record is undisputed that when Officer Tano approached and questioned Quino, she had neither probable cause nor reasonable suspicion to detain him. Therefore we decline to address this issue. Point four concerns whether Quino was "seized" when police officers pursued him as he ran through the airport terminal. Point five questions whether Quino had a reasonable expectation of privacy in the contraband he abandoned while fleeing the police officers.

I.

The Honolulu Police Department's Narcotics/Vice Airport Detail (HPD) utilizes a "walk and talk" drug interdiction program in order to arrest drug smugglers and to seize any narcotics they might be carrying on their persons or in their luggage. This "walk and talk" program does not employ any type of "drug courier profile" or require the officers to have a reasonable suspicion that a person may be in possession of illegal drugs, or may be engaged in criminal activity. Instead, members of the detail are trained to engage in "consensual encounters" whereby airline passengers are approached and, in a "conversational manner," requested to consent to a search of their luggage or person.[2]

The HPD trains its officers to approach a passenger in the following manner: (1) the officer first observes passengers arriving from an illegal drug "source city"; (2) the officer then approaches a passenger at random and identifies himself as a police officer; (3) the officer asks the passenger if he would agree to talk to him; (4) the officer then asks whether the passenger has disembarked from the targeted flight; (5) after receiving oral affirmation, the officer asks the passenger for his identification and airline ticket; (6) the officer asks the passenger if he is carrying any narcotics; (7) upon receiving a negative answer, the officer requests "consent" to search the passenger's carry-on and check-in luggage;

[2] Officer Tano testified at the suppression hearing that, "[t]here is no specific characteristic that I look for. It's just a matter of something causes you to look there and you watch."

and, (8) if the inspection is fruitless, the officer then asks the passenger whether he has any narcotics on his person and requests "consent" to pat down the passenger.

On the evening of April 3, 1990, Officers Tano and Harold Sumaoang (Officer Sumaoang) were assigned to observe passengers arriving on an American Airlines flight from San Jose.[3] Quino and two friends, Henry Galinato (Galinato) and Raul Cachola (Cachola), were observed by the two officers as they exited the gate and walked single file along the concourse. Officer Tano noticed an unnatural bulge or "bumpiness" on Galinato's back, near his beltline.[4] She did not notice anything unusual about Quino or Cachola.

After observing the three men from a distance, both officers approached and stopped them. Officer Tano identified herself as a police officer and asked permission to speak with Quino and Cachola. After they agreed, Officer Tano asked them whether they had just arrived on the American Airlines flight from San Jose; whether they had previously been to Hawaii, whether they would mind if she looked at their airline tickets, and whether they would provide identification. Meanwhile, Officer Sumaoang stopped Galinato and asked him similar questions.

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[3] This particular flight was being monitored because HPD classified San Jose as a "source city" through prior experience and information. The record is not clear regarding the flight's country of origin.

[4] At the preliminary hearing, Officer Sumaoang was asked whether he suspected any criminality was afoot when he saw Galinato's clothing. He replied, "No."

Although Officer Tano identified herself as a police officer when she approached the men, she did not attempt to explain the purpose of the questioning. However, while she was inspecting the airline tickets, Quino asked her what the inquiry was all about. It was only then that Officer Tano mentioned that she was investigating possible narcotics trafficking at the airport.

Officer Tano then asked if the men were carrying narcotics. Quino said he knew nothing about narcotics. Nevertheless, Officer Tano asked if she could check Quino and Cachola's carry-on luggage. Quino obliged and showed Officer Tano the contents of his bag. No narcotics were discovered.

At that point, Officer Tano had no reasonable suspicion that any of the individuals was carrying contraband. Nevertheless, the possibility that she might be talking to drug couriers occurred to Officer Tano because of the "body language" exhibited by both men. She testified that, "I didn't have any indication, but I was starting to get, by their actions, I was beginning to think that they might have something." She, therefore, continued to "interact" with Quino and Cachola.

After Officer Tano looked into Cachola's bag, she asked if either Cachola or Quino was carrying narcotics on their person. Each responded in the negative. She then asked if she could "pat them down" and they said "no." Around that time, Officer Tano overheard Galinato say to Officer Sumaoang, "Give me a break." Immediately thereafter, the three men started running down the corridor with the officers in pursuit.

During the chase, Officer Sumaoang observed Galinato pull a waistband-like belt and yellow and white packages from under his shirt. Galinato threw these items into potted plants as he ran towards the main

airport terminal. The packages were later determined to contain illegal drugs. Officer Sumaoang also observed Quino drop a cellophane package into a potted plant as he ran. This package was later found to contain illegal drugs.

Defendants Cachola, Galinato, and Quino were eventually arrested and charged with promoting a dangerous drug in the first degree. Galinato and Quino both filed pre-trial motions to suppress the evidence recovered during the chase at the airport. Consolidated hearings on the motions to suppress were held on August 15, September 21, and November 2, 1990. The motions were denied because the circuit court determined that the officers' initial approach and questioning were within constitutional bounds.

On January 2, 1991, Quino and Galinato were convicted of the drug charge.[5] They separately appealed, and although the ICA affirmed both convictions, only Quino requested certiorari.[6]

II.

A.

The ICA determined that Quino was not seized because: (1) the police officers' actions were lawful and would not have caused a reasonable person in Quino's position to believe that he was not free to leave, or that, if he started to leave, the police would attempt to physi-

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[5] Apparently, Cachola was notified of his trial date and failed to appear in court or remain in contact with his attorney.

[6] Galinato submitted a motion for leave to join application for writ of certiorari in State v. Quino, No. 15239. However, on June 4, 1992, his motion was denied because it was untimely filed.

cally restrain him; (2) Quino did not have the right to be advised that he could refuse to respond to the questions and simply leave the area; and (3) the circuit court's findings and legal conclusions were correct.[7]

Quino, however, argues that Officer Tano's approach and questioning of him at the airport was an unlawful and nonconsensual seizure of his person in violation of both the Fourth Amendment of the United States Constitution[8] and article I, section 7 of the Hawaii Constitution.[9] Although no physical force was used, Quino argues that the officers' show of authority and conduct communicated to him that he was not free to leave. He further contends that the incriminating evi-

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[7] The circuit court found that the officers: (1) did nothing by word and/or action to order Quino to do anything or not to do anything; (2) requested and obtained permission to do what they did; and (3) did not physically restrain Quino.

[8] The fourth amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[9] Article I, section 7 of the Hawaii Constitution (emphasis added) provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, sup-

(footnote continued)

dence obtained after he fled was inadmissible as the product of an illegal seizure. We agree.

1.

In *Terry v. Ohio,* 392 U.S. 1, 16 (1967), the United States Supreme Court recognized that a brief detention that falls short of a traditional arrest may constitute a "seizure" within the meaning of the fourth amendment. The Court held that a seizure occurs when a police officer has in some way restrained the liberty of a citizen by means of physical force or a show of authority. *Id.* at 19 n.16. In addition, the Court held that in order to justify the intrusion upon an individual's constitutionally protected interests, the police officer must observe unusual conduct which leads him reasonably to conclude, in light of his experience, that criminal activity may be afoot and that "the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous . . . . " *Id.* at 24. "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22.

More than a decade later in *United States v. Mendenhall,* 446 U.S. 544 (1980), the Court established the principle that a person is seized "only if, in view of all

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(footnote [9] continued)

> ported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554. The test focused on whether the person questioned "remains free to disregard the questions and walk away." Id. If the person is able to do so, then there is no violation of his or her constitutional rights. *Id.*; *see also Michigan v. Chesternut*, 486 U.S. 567 (1988).

However, in *California v. Hodari D.*, 499 U.S. __, 111 S.Ct 1547, 1550-51 (1991), the Court departed from previous case law by refusing to adhere to the reasonable person standard established in *Mendenhall*. The Court purported to rely on the common law definition of arrest when it held that a seizure within the meaning of the fourth amendment requires either physical force or submission to an assertion of authority. *Id.*

In analyzing seizures under article I, section 7 of the Hawaii Constitution, this court has utilized the *Medenhall* standard. In *State v. Tsukiyama*, 56 Haw. 8, 12, 525 P.2d 1099, 1102 (1974), we stated that "[i]n order to determine if the defendant's liberty was restrained and he was, therefore, seized, we must evaluate the totality of the circumstances and decide whether or not a reasonably prudent person would believe he was free to go."

In *State v. Texeira*, 50 Haw. 138, 142 n. 2, 433 P.2d 593, 597 n.2 (1967), we acknowledged that "[a]s long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection." Thus, we decline to adopt the definition of seizure employed by the United States Supreme Court in *Hodari D.* and, instead, choose to afford greater protection to our citizens by maintaining the *Mendenhall* standard.

2.

Relying on *Mendenhall*, Quino argues that a reasonable person under the circumstances would have concluded that he was not "free to leave" during the police-initiated encounter. The State argues that *Tsukiyama* supports its proposition that no seizure of Quino occurred because the questioning here was similar to the "field interrogation" discussed in *Tsukiyama*. There, we determined that the "field interrogation" was not an unconstitutional detention because it did not deprive Tsukiyama of his freedom to move. *Tsukiyama*, 56 Haw. at 14, 525 P.2d at 1103.

In *Tsukiyama*, a police officer on routine patrol late at night came upon three vehicles parked on the street. A group of men was standing around one of the vehicles which had stalled. The officer called for backup and began to converse with Tsukiyama. In time, at least ten police officers arrived and parked around the three vehicles. *Id.* at 9, 525 P.2d at 1100-01. When one of the police officers asked Tsukiyama if he had any identification, Tsukiyama replied that it was in his glove compartment. *Id.* at 10, 525 P.2d at 1101. Without objecting, he proceeded to his vehicle. As two police officers shined their flashlights into his car, Tsukiyama opened the glove compartment, and the butt of a gun was revealed. *Id.* at 11, 525 P.2d at 1101. Recovery of the gun led to the discovery of narcotics in the glove compartment and Tsukiyama was arrested. *Id.*

Prior to trial, Tsukiyama's motion to suppress the evidence was denied by the circuit court. *Id.* On appeal, Tsukiyama alleged that the motion to suppress had been improperly denied because he had been unconstitutionally seized prior to the officer observing the gun in the glove compartment. *Id.* at 11, 525 P.2d at 1101-02. We

affirmed Tsukiyama's conviction and held that no "stop" or "seizure" had taken place. *Id.* at 17, 525 P.2d at 1105. We found the "field interrogation" permissible because, given the totality of the circumstances, the officers had not restricted Tsukiyama's right to move. *Id.* at 14, 525 P.2d at 1103. We also found nothing in the record to show that Tsukiyama had been coerced into cooperating with the officer. *Id.* at 16-17, 525 P.2d at 1105.

Quino's situation differs substantially from Tsukiyama because Officers Tano and Sumaong deliberately initiated their encounter with Quino and his companions for the specific purpose of investigating possible drug trafficking by them. Utilizing questions that gradually became more intrusive, the officers sought to bootstrap their investigation into discovery of possible criminal activity by the group. By contrast, the officers in *Tsukiyama* came upon the men by happenstance. The questions asked were general, non-intrusive and limited to a request for identification. No one in the group was under investigation for specific criminal activity until the gun was observed in the glove compartment.

The record establishes that Officer Tano initially approached Quino and the others by starting an apparently innocuous "voluntary conversation." This "voluntary conversation" soon evolved into an interrogation, as Officer Tano's questions grew more intrusive and accusatory in nature.[10] The questions were also

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[10] The type of questions posed to Quino and the others indicated that the officers hoped their encounter would ripen into a "discovery" that the men were carrying narcotics.

pretextual, specifically designed to elicit responses that would either vindicate or implicate the men.

In a staged police-citizen encounter such as this, the police exercise complete control over the interaction. The course of the questioning and the insinuative nature of the questions are left entirely to the discretion of the officer. For example, even after Quino informed Officer Tano that he knew nothing about narcotics, she sought to inspect his carry-on bag. When she found nothing in the carry-on, Officer Tano continued her questioning. She requested a pat down search, although she lacked a single reason to suspect Quino was concealing contraband. Moreover, the circumstances beget an obligation by the citizen to reply to any and all questions, no matter how intrusive, lest the authorities deem one's conduct suspicious. Had Quino cooperated by producing his airline ticket and identification, but refused an inspection of his bags or a pat down search, the officer's suspicion would surely have been aroused. Thus, the police investigation is benefitted immensely by the pretextual stop and questioning process. Here, Officer Tano was able to observe Quino's body language and evaluate his responses. If Quino's behavior had provided an objective basis to suspect criminal activity, a *Terry* stop could have been effected.

Under these facts, we are persuaded that once the stop turned from general to inquisitive questioning, a reasonable person in Quino's position would not have believed that he was free to ignore the officer's inquiries and walk away. Although no physical force was used, given the totality of the circumstances, we hold that a seizure took place within the meaning of article I, section 7 of the Hawaii Constitution.

B.

The United States Supreme Court has previously held that police questioning in an airport terminal may not be an unconstitutional seizure when there is consent. For example, in *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion), the court explained that:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Similarly, in *Florida v. Bostick*, 501 U.S. __, 111 S.Ct. 2382, 2384 (1991), the Court held that "[t]he Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as the reasonable person would understand that he or she could refuse to cooperate."

The State argues that there was no constitutional violation under state and federal law because the encounter between Officer Tano and Quino was "consensual."[11] Quino, however, argues that he felt com-

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[11] Both state and federal law have recognized that one may consensually waive his constitutional right to be free from warrantless searches and seizures. *See Bostick*, 501 U.S. at ___, 111 S.Ct. at 2389; *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Pau'u*, 72 Haw. 505, 824 P.2d 833 (1992); *Nakamoto v. Fasi*, 64 Haw. 16, 635 P.2dd 946 (1981).

pelled to submit to Officer Tano's questions, and thus did not freely and voluntarily consent to a seizure of his person. He further contends that his alleged voluntary consent could not have been given because he was never informed that he did not have to cooperate with the officers.

Waiver of one's constitutional rights must be freely, voluntarily and intelligently undertaken. Furthermore, it is the government's burden to prove that the waiver was voluntary and uncoerced. *See State v. Pau'u*, 72 Haw. 505, 509, 824 P.2d 833, 835 (1992) (citations omitted). This court has previously held that an officer has no affirmative duty to inform a person approached for questioning that he is free to leave the encounter at any time; however, failure to inform is a factor to be considered in evaluating whether consent has been freely and voluntarily given. *Nakamoto v. Fasi*, 64 Haw. at 21, 635 P.2d at 951.

Under the circumstances of this case, we conclude that Quino did not voluntarily and intelligently agree to be detained. By approaching the group of men and failing to disclose that they were free to go at any time, the officers were concealing their investigative objective precisely to gain Quino's "consent." We note that the officers did not volunteer information that they were investigating drug trafficking at the time they announced their office. Consent, based upon such material nondisclosures, can hardly be viewed as either voluntary or intelligent.

Moreover, the State cannot rely on Quino's acquiescence to establish that he voluntarily consented to the seizure of his person. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968) (footnotes omitted) (Court held that the prosecution's burden of proving that consent

was freely and voluntarily given cannot be discharged by showing no more than an acquiescence to a claim of lawful authority). Here, Quino's submission to the officers' requests cannot be deemed consensual. Because the State has failed to meet its burden of proof that consent was voluntary and uncoerced, we hold that Quino's seizure was unlawful.

C.

We cannot allow the police to randomly "encounter" individuals without any objective basis for suspecting them of misconduct and then place them in a coercive environment in order to develop reasonable suspicion to justify their detention. This investigative technique is based on the proposition that an otherwise innocent person, who comes under police scrutiny for no good reason, is not innocent unless he or she convinces the police that he or she is. Such a procedure is anathema to our constitutional freedoms. For these reasons, we hold that the police conduct violated Quino's right to be secure against unreasonable seizures guaranteed by article I, section 7 of the Hawaii Constitution.

Accordingly, we reverse Quino's conviction, order the evidence suppressed, and remand the case to circuit court for proceedings consistent with this opinion. Concurrently, we order order depublication of the ICA opinion.

/s/ Herman T.F. Lum

/s/ Ronald T. Y. Moon

/s/ Robert G. Klein

/s/ Yoshimi Hayashi

On the briefs:
Theodore Y.H. Chinn,
Deputy Public Defender,
for petitioner-appellant

Charlotte J. Duarte,
Deputy Prosecuting Attorney,
for respondent-appellee

CONCURRING OPINION BY LEVINSON, J.

I enthusiastically concur in the holdings of the cogently reasoned majority opinion that a seizure took place in this case within the meaning of article I, section 7 of the Hawaii Constitution, that Quino was unlawfully seized without his consent, and that, on the record before us, the conduct of the police therefore violated article I, section 7 of the Hawaii Constitution. But in light of the surreal and Orwellian world of *Florida v. Royer*, 460 U.S. 491 (1983), *California v. Hodari D.*, 499 U.S. __, 111 S.Ct. 1547 (1991), and *Florida v. Bostick*, 501 U.S. __, 111 S.Ct. 2382 (1991), in which the fourth amendment to the United States Constitution seems to have atrophied to the condition of a vestigial organ, I believe that more needs to be said.

Article I, section 7 of the Hawaii Constitution[1] protects people from unreasonable government intru-

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[1] Article I, section 7 of the Hawaii Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted. (Emphasis added.) The words "invasions of privacy" were added to article I, section 7 by the 1968 Constitutional Convention. *State v. Roy*, 54 Haw. 513, 518, 510 P.2d 1066, 1069 (1973) (Levinson, J., concurring). The Convention's Standing Committee Report No. 55 stated: "The proposed amendent is intended to include protection against indiscriminate wire-tapping as well as undue government inquiry into and regulation of those areas of a person's life which is [sic] defined as necessary to insure 'man's individuality and human dignity.'" *Id.* (Emphasis added.)

sions into their legitimate expectations of privacy. *State v. Clark*, 65 Haw. 488, 493,654 P.2d 355, 359 (1982); see also, *State v. Fields*, 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984). And, as "the ultimate judicial tribunal in this state," this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution. *Fields*, 67 Haw. at 282, 686 P.2d at 1390.[2] "'The basic purpose . . . [of these constitutional provisions] is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.' *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The constitutional proscription . . . that the person and effects of an individuals

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[2] In *State v. Texeira*, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967), this court had the courage and foresight to forge the apparently revolutionary notion that "[a]s long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection." We have adhered steadfastly to this principle. *See, e.g., State v. Grahovac*, 52 Haw. 527, 531, 533,480 P.2d 148, 151-52 (1971); *State v. Santiago*, 53 Haw. 254,265-66, 492 P.2d 657, 664 (1971); *State v. Kaluna*, 55 Haw. 361, 367-69, 372-75, 520 P.2d 51, 57-58, 60-62 (1974); *State v. Manzo*, 58 Haw. 440, 452, 573 P.2d 945, 953 (1977); *State v. Miyasaki*, 62 Haw. 269, 280-82, 614 P.2d 915, 921-23 (1980); *Huihui v. Shimoda*, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982); *State v. Fields*, 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984); *State v. Wyatt*, 67 Haw. 293, 304 n.9, 687 P.2d 544, 552 n.9 (1984); *State v. Tanaka*, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985); *State v. Kim*, 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985); *State v. Kam*, 69 Haw. 483, 491,748 P.2d 372, 377 (1988).

[sic] are considered to be sacrosanct and may not be the object of unreasonable searches and seizures . . . draws no distinction in its application between an individual suspected of criminal activity and one who is not." *Nakamoto v. Fasi*, 64 Haw. 17, 20, 635 P.2d 946, 950 (1981) (brackets in original). Thus, article I, section 7 of the Hawaii Constitution was "designed to protect the individual from arbitrary, oppressive, and harassing conduct on the part of government officials." *Fasi*, 64 Haw. at 23,635 P.2d at 952.

In *State v. Melear*, 63 Haw. 488, 630 P.2d 619 (1981), this court delineated the circumstances under which the police may properly conduct an investigative stop of an individual:

> It is well established that a law enforcement officer may "in appropriate circumstances and in [an] appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *State v. Barnes*, 58 Haw. 333, 337,568 P.2d 1207, 1211 (1977). We stated in *State v. Barnes, supra*, at 338,568 P.2d at 1211:
>
> > To justify an investigative stop, short of an arrest based on probable cause,"the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The ultimate test in these situations [is] whether [] a

> man of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate. (Citations omitted.)

63 Haw. at 493, 630 P.2d at 624 (emphasis added).

It is precisely because article I, section 7 of the Hawaii Constitution was designed, among other things, "'to safeguard the privacy . . . of individuals against arbitrary invasions'" and "arbitrary, oppressive, and harassing conduct" by the police, *Fasi*, 64 Haw. at 20, 23, 635 P.2d at 950, 952, that we have conditioned an investigative stop on the police officer's capacity "'to point to specific and articulable facts . . .' [warranting a reasonable belief] that criminal activity [is] afoot." *Melear*, 63 Haw. at 493, 630 P.2d at 624. To require otherwise would be to invite the very sort of "staged" and "pretextual" police-citizen encounter that occurred in the present case and that the majority has described and disapproved so eloquently. Such charades do indeed permit the police to seize individuals, *see Terry v. Ohio*, 392 U.S. 1, 16 (1968), at random and require them to convince the officers of their innocence of wrongdoing. They also potentially permit the police to sanitize an unlawful, suspicionless "encounter" by construing the subject's non-cooperation as "suspicious" or "flight" and then claiming "probable cause" to arrest. *Cf. Melear*, 63 Haw. at 494, 630 P.2d at 625; *Sibron v. New York*, 392 U.S. 40, 66-67 (1968).

I agree with the majority that such a state of affairs "is anathema to our constitutional freedoms." According to the United States Supreme Court, the fourth amendment to the United States Constitution may not be offended, *see, e.g., Florida v. Bostick*, 501 U.S. at __, 111 S.Ct. at 2384, 2386 (1991), but, in my view, article I, section 7 of the Hawaii Constitution certainly is.

/s/ Steven — Levinson

APPENDIX "B"

IN THE INTERMEDIATE COURT OF APPEALS OF
THE STATE OF HAWAII

STATE OF HAWAII, plaintiff-Appellee, v.
FERDINAND Q. QUINO, Defendant-Appellant, and
HENRY TUGCAY GALINATO and
RAUL CENTORNA CACHOLA, Defendants

NO. 15239

and

STATE OF HAWAII, Plaintiff-Appellee, v.
HENRY TUGCAY GALINATO, Defendant-Appellant,
and Raul Centorna Cachola and
FERDINAND Q. QUINO, Defendants

NO. 15218

APPEAL FROM THE FIRST CIRCUIT COURT

(CR. NO. 90-0721)

MAY 7, 1992

BURNS, C.J., HEEN, J.,
AND CIRCUIT JUDGE CHUN,
ASSIGNED BY REASON OF VACANCY

ARREST - in general.

SEARCHES AND SEIZURES - in general.

Three kinds of police-person encounters have been identified. First is the "voluntary con-

versation." Second is the "investigative stop/temporary detention." Third is the "arrest."

A voluntary conversation is not a seizure. Both the investigative stop/temporary detention and the arrest are seizures. A seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.

The phrase "free to leave" is used in an "is it a fact" context. Therefore, a seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have reasonably believed that if he or she started to leave, the police would attempt to physically restrain him or her from leaving.

APPEAL AND ERROR - review.

The answer to the question whether a reasonable person would have reasonably believed that he or she was not free to leave an encounter with the police is reviewable under the de novo or right/wrong standard of appellate review.

ARREST - in general.

SEARCHES AND SEIZURES - in general.

During a police-person voluntary conversation that was instigated by the police, the police are not required to advise the person that he or she has a right not to answer the officer's questions and to leave.

ARREST - in general.

SEARCHES AND SEIZURES - in general.

During a police-person voluntary conversation that was instigated by the police, the police do not need reasonable suspicion or the like to

lawfully engage in the conversation and, while conversing, to ask the person for voluntary answers to questions and for voluntary permission to pat-down search the person.

ARREST - in general.

SEARCHES AND SEIZURES - in general.

An investigative stop/temporary detention by a police officer is lawful when (1) the specific and articulable facts, and the rational inferences from those facts, warrant a person of reasonable caution to believe that criminal activity is afoot and the action taken is appropriate; (2) there is reasonable and articulable suspicion that the person has committed or is about to commit a crime; or (3) there is reasonable and articulable suspicion of criminal activity.

ARREST - in general.

SEARCHES AND SEIZURES - in general.

In certain circumstances, spontaneous flight from the police officer's presence may authorize an investigative stop/temporary detention.

EVIDENCE - materiality and competency in general.

Incriminating evidence abandoned in reasonable response to the unlawful activities of the police is the fruit of a poisonous tree which must be suppressed upon proper request.

OPINION OF THE COURT BY BURNS, C.J.

Defendant Henry Tugcay Galinato (Galinato) appeals the circuit court's February 15, 1991 judgment upon a jury verdict finding him guilty of promoting a dangerous drug in the first degree and sentencing him to eight years' incarceration. Defendant Ferdinand Q. Quino (Quino) appeals the circuit court's March 6, 1991 judgment upon the same jury verdict finding him guilty of promoting a dangerous drug in the first degree and sentencing him to twenty years' incarceration. More specifically, Galinato and Quino appeal the denial of their July 6, 1990 motions to suppress the incriminating evidence. We affirm.

FACTS

On April 3, 1990, at about 10:45 p.m., plainclothes police officers Tanya Tano (Officer Tano) and Harold Sumaoang (Officer Sumaoang), who were assigned to the narcotics-vice detail at the Honolulu International Airport, were monitoring the passengers arriving from San Jose, which the police identified as a narcotics source city. They observed arriving passengers Galinato, Quino, and Raul Centorna Cachola (Cachola) walking in a single file. They observed a bumpy area in the small of Galinato's back above Galinato's beltline and decided to follow and possibly talk to them. Officer Tano identified herself as a police officer to Quino and Cachola and showed them her badge. The three stopped walking when Cachola stepped into the path of Quino and Officer Tano. Officer Tano asked Quino and Cachola if she could talk to them for a minute. They both said, "[Y]eah."

Galinato had stopped to look back from where he had come and to look at the overhead flight information

board. Officer Sumaoang spoke to Galinato, identified himself as a police officer, and asked for and received permission to talk to him.

Officer Tano talked to Quino and Cachola. Officer Sumaoang talked to Galinato. However, they generally asked the same questions. Each asked if the party(ies) being questioned had just exited the American Airlines flight from San Jose. The answers were yes. Each then asked if it was the first time that the party(ies) being questioned had been to Hawaii. The answers were yes. Each then asked the party(ies) being questioned if they minded the officers' looking at their airline tickets. Quino pointed to Cachola's hand-carry bag from where Cachola, his hand visibly shaking, obtained three American Airline ticket jackets and handed two of them to Officer Tano. Both were one-way tickets purchased on that same day for $459.00 cash. Galinato obtained his airline ticket from Cachola and gave it to Officer Sumaoang. The name on the ticket was "Nestor Calsada." The officers then asked if they could see some kind of identification. Cachola looked like he was panicking. Quino responded that he did not bring any identification with him.

While Officer Tano was looking at the airline tickets, Quino asked her what the inquiry was all about. Officer Tano responded that they were investigating possible narcotics trafficking at the airport and liked to interview people arriving from certain flights. Quino stated that he knew nothing about narcotics. Quino's and Cachola's actions gave Officer Tano the impression that they were panicking and wanted to run. Quino again asked what this was all about. Officer Tano again explained and then asked Quino if he was carrying any narcotics Quino unzipped his bag, displayed its contents, and said that he did not have any narcotics. Officer Tano

asked Cachola if he was carrying narcotics. Cachola answered no. Officer Tano asked Cachola if he would mind if she looked through his bag. Cachola handed Officer Tano his bag which was unzipped. While Officer Tano looked through Cachola's bag, she noticed Quino and Cachola backing away from her. After looking through Cachola's bag, Officer Tano walked up to Cachola, returned his bag, and asked him if he was carrying any narcotics on his person. Cachola backed away from her and said no. Officer Tano asked Cachola if he would mind if she patted him down. At the same time, Officer Sumaoang asked Galinato whether he was carrying any illegal narcotics and if Galinato would mind if Officer Sumaoang patted him down. Galinato responded by saying, very nervously, "Give me a break." Thereupon Galinato, Quino, and Cachola started running toward the main terminal. Officers Tano and Sumaoang chased them yelling, "Stop. Police. Stop." While running, Galinato reached under his shirt, pulled out a waistband which had a yellow and whitish package attached to it, and threw it into the potted plants. While running, Quino reached under his shirt and pulled out a yellow and whitish package and threw it into the potted plants. While Officer Sumaoang was wrestling with Quino, he felt a waistband around Quino's waist. While Officer Tano was struggling with Cachola, Cachola's shirt was torn and Officer Tano observed a rubber belt around Cachola's stomach. In the front portion of the beat, she saw a plastic bag with a crystal substance inside.

The circuit court orally decided as follows:

1. No reasonable suspicion is necessary for a police officer to walk up to an arriving passenger and converse with him.

2. Galinato, Quino, and Cachola voluntarily consented to answer the police officers' questions.

3. Galinato, Quino, and Cachola were not in detention or custody during the questioning. They were free to leave. There was no investigative stop/temporary detention.

4. Galinato and Quino abandoned, and therefore had no reasonable expectation of privacy in, the items they threw into the plants as they were running.

Galinato and Quino contend that they were unlawfully stopped, detained, chased, seized, and arrested and that all of the incriminating evidence recovered was the product of illegal searches and the fruit of a poisonous tree.

DISCUSSION

I.

Three kinds of police-person encounters have been identified. First is the "voluntary conversation." Second is the "investigative stop/temporary detention." Third is the "arrest."

A voluntary conversation is not a seizure. Both the investigative stop/temporary detention and the arrest are seizures. A seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *United States v. Mendenhall*, 446 U.S. 544,100 S.Ct. 1870, 64 L.Ed.2d ___ (1980); *State v. Tsukiyama*, 56 Haw. 8,525 P.2d 1099 (1974).

An investigative stop/temporary detention requires reasonable and articulable suspicion as defined in *State v. Barnes*, 58 Haw. 333, 568 P.2d 1207 (1977); is limited to the investigative purpose of the stop; cannot

last any longer than is reasonably necessary to effectuate the investigative purpose of the stop; and must employ the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

An arrest requires probable cause as defined in *State v. Barnes*, 58 Haw. 333,568 P.2d 120 (1977). *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In Hawaii, it is necessary to define what is meant by the phrase "free to leave." If the phrase were used in a "is it lawful" context, there would be some problems. First, it is difficult for lawyers to decide what is a reasonable nonlawyer's understanding of the law. Second, in Hawaii, except in a motor vehicle, it is not unlawful to flee from a police officer seeking to have a voluntary conversation, to make an investigative stop/temporary detention, or to make an arrest. See, HRS §§ 710-1026 and Commentary thereto, -1027 (1985). On the other hand, it is lawful for a police officer who has legal grounds to make an investigative stop/temporary detention or an arrest of a person to physically restrain the person from leaving. We conclude that the phrase is used in a "is it a fact" context and that a seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have reasonably believed that, if he or she started to leave, the police would attempt to physically restrain him or her from leaving.

The circuit court of the Ninth Circuit has held that the answer to the question whether a reasonable person would have believed that he or she was free to leave an encounter with the police is reviewable under the clearly erroneous standard of appellate review. *United States v. Erwin*, 803 F.2d 1505 (9th Cir. 1986). We disagree. In any

given factual situation, there can be only one right answer to the questien of what a reasonable person would have believed or concluded. Therefore, that answer is reviewable under the de novo or right/wrong standard of appellate review. If the clearly erroneous standard were applicable, then in a situation where two defendants were involved in the same encounter and one judge decided that a reasonable person in one defendant's shoes would have believed or concluded one way and another judge decided that a reasonable person in the other defendant's shoes would have believed or concluded the opposite way, the appellate court may have to affirm the contradictory findings.

III.

Quino and Galinato contend that the police officers' calculated approach without any articulable facts to justify it constituted a seizure. They contend that the significant factors are that the questions were pretextual, accusatory, designed to detain and intimidate citizens at the airport, and specifically focused on the unlawful possession of narcotics; the officers did not advise the persons questioned that they were free to leave without answering the officers' questions; and the officers took physical possession of the airline tickets, holding the tickets while they continued their questioning.

The question is whether, viewing the totality of the circumstances, a reasonable person in Galinato's and Quino's shoes would have reasonably believed that he was not free to terminate the conversation with Officers Tano and Sumaoang and to leave or that, if he started to leave, the officers would attempt to physically restrain him from leaving.

The police did take physical possession of what was left of the airline tickets after they had been used and the flight was completed. The record does not reveal if or when they returned them. It also does not reveal whether Galinato or Quinot had any baggage claim checks. However, there is evidence that Officer Tano gave Cachola back his bag after she searched it.

Quino and Galinato are challenging the legality of the actions of the police officers prior to the time Quino and Galinato started running. We conclude that (a) these actions by the police officers' were lawful and would not have caused a reasonable person in the shoes of Galinato and Quino to reasonably believe that he was not free to leave or that, if he started to leave, the police would attempt to physically restrain him from leaving; (b) Galinato and Quino did not have the right to be advised that they had a right not to answer the officers' questions and to leave, *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); and (c) the circuit court's findings that during the time of these actions the police officers (i) did not by word and/or by act command or order Galinato and Quino to do anything or not to do anything, (ii) requested and obtained permission to do what they did, and (iii) did not physically restrain Quino and Galinato are not clearly erroneous.

IV.

It is contended that Galinato and Quino were unlawfully asked if they (a) were carrying any narcotics and (b) would consent to a pat-down search. Galinato contends that, absent some articulable reason to suspect the presence of illegal contraband or weapons, police officers should not be allowed to approach and request a citizen to submit to a pat-down search of their body. In other

words, Galinato and Quino contend that the police needed reasonable suspicion or the like to engage in a voluntary conversation with them. We disagree. A police officer does not need reasonable suspicion or the like to lawfully engage in a voluntary conversation with a person and, while conversing, to ask the person for voluntary answers to questions and for voluntary permission to pat-down search the person. *State v. Tsukiyama, supra.*

V.

In Hawaii and other jurisdictions, it is a rule that incriminating evidence abandoned in reasonable response to the unlawful activity of the police is the fruit of a poisonous tree which must be suppressed upon proper request. *State v. Pau'u*, 72 Haw. 505, 824 P.2d 833 (1992); *Hawkins v. State*, 758 S.W.2d 255 (Tex. Ct. App. 1988). Therefore, the issue is (a) whether Galinato and Quino were unlawfully ordered to stop and chased for an unlawful purpose after they commenced running away from Officers Tano and Sumaoang; and, if the answer to (a) is yes, then (b) whether Galinato and Quino (i) abandoned the contraband (ii) independently of the police misconduct. Our answer to question (a) is no. Since Galinato and Quino were lawfully ordered to stop and chased for a lawful purpose, the question of abandonment is inconsequential.

An investigative stop/temporary detention by a police officer is lawful when (1) the specific and articulable facts, and the rational inferences from those facts, warrant a person of reasonable caution to believe that criminal activity is afoot and the action taken is appropriate, *State v. Barnes*, 58 Haw. 333, 568 P.2d 1207 (1977); (2) there is reasonable and articulable suspicion that the person has committed or is about to commit a

crime, *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 5 L.Ed.2d 229 (1983); or (3) there is reasonable and articulable suspicion of criminal activity, *United States v. Brignoni-Poncee*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

In certain circumstances, spontaneous and rapid flight from the police officer's presence may authorize an investigative stop/detention. In *United States v. Have*, 825 F.2d 32 (4th Cir. 1987), defendants exhibited some characteristics of the drug courier profile and ran when the police identified themselves. In *United States v. Jackson*, 741 F.2d 223 (8th Cir. 1984), Jackson and another man were standing in an alley. When the police, in a marked patrol car, turned into the alley, Jackson shouted, "It's the police, man, run," and the two men fled. In Quino's and Cachola's case, the facts leading up to the spontaneous and rapid flight together with the fact of the spontaneous and rapid flight gave the police officers an articulable and reasonable basis to believe that Galinato and/or Quino were committing a crime and that an investigative stop/temporary detention was appropriate.

CONCLUSION

Accordingly, we affirm the circuit court's (1) February 15, 1991 judgment convicting Henry Tugcay Galinato of promoting a dangerous drug in the first degree and (2) March 6, 1991 judgment convicting Ferdinand Q. Quino of promoting a dangerous drug in the first degree.

John M. Tonaki
Deputy Public Defender,
on the brief for
defendant-appellant
Ferdinand Q. Quino.

/s/ James A. Burns

/s/ Walter M. Heen

/s/ Philip T. Chun

Collin K.C. Lau
on the briefs for
defendant-appellant
Henry Tugcay Galinato.

Charlotte J. Duarte
Deputy Prosecuting
Attorney, on the briefs
for plaintiff-appellee.

CERTIFICATE OF SERVICE

I hereby certify that 1 copy of the foregoing was served upon the following on May 8, 1992 by:

(X) Leaving the same at:

( ) Mailing the same, postage prepaid, addressed to:

(X) OFFICE OF THE
PROSECUTING ATTORNEY
City and County of Honolulu
1164 Bishop Street
Honolulu, Hawaii 96813

( ) OFFICE OF THE ATTORNEY
GENERAL
State of Hawaii
425 Queen Street/ 3rd Floor
Honolulu, Hawaii 96813

( ) _____

_____

_____

_____

/s/ J. Garrett
COURT RUNNER

APPENDIX "C"

NO. **15239**

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	)	CRIMINAL NO. 90-0721
	)	
Respondent-Appellee,	)	CERTIORARI TO THE
	)	INTERMEDIATE
v.	)	COURT OF APPEALS
	)	
FERDINAND Q. QUINO,	)	HONORABLE
	)	HERMAN LUM
Petitioner-Appellant,	)	Chief Justice
	)	HONORABLE RONALD
and	)	MOON
	)	HONORABLE ROBERT
HENRY TUGCAY	)	KLEIN
GALINATO,	)	Justices
	)	and
RAUL CENTORNA	)	HONORABLE YOSHIMI
CACHOLA,	)	HAYASHI
	)	Retired Justice
Defendants.	)	(Assigned by Reason of
	)	Vacancy)
_____	)	

MOTION FOR RECONSIDERATION
OF OPINION FILED ON OCTOBER 28, 1992

MEMORANDUM IN SUPPORT
OF MOTION FOR RECONSIDERATION

AFFIDAVIT OF CHARLOTTE J. DUARTE

CERTIFICATE OF GOOD FAITH

EXHIBITS A and B

and

CERTIFICATE OF SERVICE

KEITH M. KANESHIRO 2027
Prosecuting Attorney
CHARLOTTE J. DUARTE 2459
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Attorneys for State of Hawaii
Respondent-Appellee

NO. **15239**

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
	)
Respondent-Appellee,	) CERTIORARI TO THE
	) INTERMEDIATE
v.	) COURT OF APPEALS
	)
FERDINAND Q. QUINO,	) HONORABLE HERMAN
	) LUM
Petitioner-Appellant,	) Chief Justice
	) HONORABLE RONALD
and	) MOON
	) HONORABLE ROBERT
HENRY TUGCAY	) KLEIN
GALINATO,	) Justices
	) and
RAUL CENTORNA	) HONORABLE YOSHIMI
CACHOLA,	) HAYASHI
	) Retired Justice
Defendants.	) (Assigned by Reason of
	) Vacancy)
_____	)

MOTION FOR RECONSIDERATION

Respondent-Appellee, STATE OF HAWAII (hereinafter "State"), by and through its attorney Charlotte J. Duarte, Deputy Prosecuting Attorney for the City and County of Honolulu, State of Hawaii, hereby moves this

Honorable Court to reconsider its Opinion filed on October 28, 1992 (hereinafter "Opinion," and attached hereto as Exhibit "A") on the grounds that this Court misapprehended salient facts as reflected by the evidence in the Record on Appeal, relied upon those misapprehended facts in rendering its Opinion, and misapprehended the proper application of appropriate legal standards in its analysis of the facts in the instant case.

The State also seeks oral argument on the questions presented herein.

This motion is brought pursuant to Rule 40, *Hawaii Rules of Appellate Procedure* (hereinafter "*H.R.A.P.*") and is supported by the Memorandum in Support of Motion for Reconsideration, Affidavit of Charlotte J. Duarte, and Certificate of Good Faith, attached hereto and incorporated by reference herein, and the records and files in this case.

Dated at Honolulu, Hawaii: November 9, 1992.

Respectfully submitted,

STATE OF HAWAII
Respondent-Appellee

By KEITH M. KANESHIRO
Prosecuting Attorney

By /s/ Charlotte J. Duarte
Deputy Prosecuting Attorney
City and County of Honolulu

NO. **15239**

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
	)
Respondent-Appellee,	) CERTIORARI TO THE
	) INTERMEDIATE
v.	) COURT OF APPEALS
	)
FERDINAND Q. QUINO,	) HONORABLE HERMAN
	) LUM
Petitioner-Appellant,	) Chief Justice
	) HONORABLE RONALD
and	) MOON
	) HONORABLE ROBERT
HENRY TUGCAY	) KLEIN
GALINATO,	) Justices
	) and
RAUL CENTORNA	) HONORABLE YOSHIMI
CACHOLA,	) HAYASHI
	) Retired Justice
Defendants.	) (Assigned by Reason of
	) Vacancy)
_____	)

MEMORANDUM IN SUPPORT
OF MOTION FOR RECONSIDERATION

I.

INTRODUCTION

On October 28, 1992, this Court filed its Opinion reversing and depublishing the May 7, 1992 Opinion of the Intermediate Court of Appeals in the above-entitled case. *See* Exhibit "B," attached. The State moves for reconsideration of the Opinion of this Court on three grounds.

First, this Court's appears to be based upon the premise that Officers Sumaoang and Tano actually stopped defendants Galinato and Quino, respectively, and then began to engage them in conversation. However, the State submits that this premise is not reflected in the record on appeal and, as such, is an incorrect basis for this Opinion. *See* Opinion at 3.

Second, in determining the appropriate test to be applied in deciding the question of whether Quino and Galinato had been "seized," as a matter of law, this Court cites for authority to *United States v. Mendenhall*, 446 U.S. 522 (1980) and a Hawaii case which had been decided six years earlier, *State v. Tsukiyama*, 56 Haw. 8, 12, 525 P.2d 1099, 1102 (1974). *See* Opinion at 8. However, this Court appears to have misapplied the *Mendenhall* and *Tsukiyama* tests in determining "that a reasonable person in Quino's position would not have believed that he was free to ignore the officer's inquiries and walk away." *See* Exhibit "A," attached, at 12.

Third, this Court failed to apply the proper legal standards in this case in that the necessary balancing between the needs of law enforcement and the need of the citizenry is entirely absent from this Court's analysis and was apparently overlooked by this Court.

II.

FACTS

Quino, Galinato and a third companion, defendant Raul Cachola (hereinafter "Cachola"), had arrived together at the Honolulu International Airport; as they passed Officers Sumaoang and Tano, standing near the arrival gate, the officers attention was drawn to an unnatural bulge near the middle of Galinato's back under his clothes, too high to be his belt line, and they decided to follow the three men. *See* Transcript of April 10, 1990 (hereinafter "Tr. 4/10/90 at __") at 11-3, 34, 39, 40-1, 45, 65, 66, 74-5; *see also* Transcript of August 15, 1990 (hereinafter "Tr. 8/15/90 at___") at 32-3; *see also* Transcript of September 21, 1990 (hereinafter "Tr. 9/21/90 at ___") at 22-3. Tano and Sumaoang began walking behind them with the other disembarking passengers toward Gate 23. Tr. 4/10/90 at 13, 41-2, 59, 64-5. As they walked, the three men appeared to be conversing with each other. Tr. 4/10/90 at 44. Galinato stopped at a fork in the main concourse, began looking around and looking at the flight arrival and departure boards while Quino and Cachola continued past Galinato down the concourse. Tr. 4/10/90 at 13, 45, 65; Tr. 8/15/90 at 35. Galinato had stopped at a location where people usually stopped on the concourse to read the flight arrival and departure boards. Tr. 11/2/90 at 20-1, 25. At this point the officers who were still walking down the concourse decided to approach the three men to speak with them. Tr. 4/10/90 at 13, 42, 59, 75.

As Galinato stood at the boards, Sumaoang approached him, identified himself by name and as a Honolulu police officer and asked Galinato, "May I speak

with you?", to which Galinato expressly responded in the affirmative. Tr. 4/10/90 at 66-7, 68, 75-6; Tr. 11/2/90 at 24. Sumaoang was not blocking Galinato's path in any way. Tr. 4/10/90 at 75-6.

Meanwhile, Quino and Cachola had walked past Galinato and Sumaoang, and Tano also walked past them following Quino and Cachola for some distance, until she approached Quino on his left, showed him her badge and identified herself, while they continued to walk. Tr. 4/10/90 at 13; Tr. 8/15/90 at 35. Cachola, who was on Quino's right and walked on ahead of, and in front of Quino, turned around, and faced Quino and Tano. Tr. 4/10/90 at 14; Tr. 8/15/90 at 35-6. Tano and Quino, who had continued to converse as they walked down the concourse, had to stop walking because Cachola had stepped in front of them. Tr. 8/15/90 at 36. At this point, Tano again identified herself, this time addressing herself specifically to Cachola. Tr. 4/10/90 at 15; Tr. 8/15/90 at 36.

Tano asked both Cachola and Quino if she could speak with them for a few minutes and they both affirmatively and expressly agreed to speak with her. Tr. 4/10/90 at 16. Tano then asked both of them if they had just arrived on an American Airlines flight from San Jose and Cachola responded "Yeah." Tr. 4/10/90 at 16-7. Tano then asked them if they were visiting Hawaii or if they lived here and Cachola responded that this was their first trip to Hawaii. Tr. 4/10/90 at 17; Tr. 8/15/90 at 27. Tano then asked them if they minded showing her their airline ticket, and Quino responded that the tickets were in his bag, pointing to Cachola's carry-on bag, at which point Cachola opened the bag and took out three American Airlines ticket jackets. Tr. 4/10/90 at 17. Cachola's hand was visibly shaking as he removed the tickets and handed

two of them to Tano. At the same time, Quino moved away from Tano and stood near Cachola. Tr. 4/10/90 at 17-8, 21.

The tickets were one-way from San Jose, purchased with cash on the date of travel, and made out to one Marino Quicho and one Rudy Calsona. Tr. 4/10/90 at 21-2. Based on Tano's training and experience, she was aware that narcotics couriers frequently carried tickets purchased with cash on the date of travel from narcotics source cities, often with over-night turn around time. Tr. 9/21/90 at 25.

At this point, Galinato and Sumaoang had walked over to within earshot of Tano, Quino and Cachola, and Cachola handed the third ticket to Galinato. Tr. 8/15/90 at 38-9; Tr. 9/21/90 at 35. After looking at the tickets, and knowing, based on her training and experience, that drug couriers often traveled under fictitious names, Tano asked Quino and Cachola for identification and Quino responded that he did not have any. Tr. 4/10/90 at 22. Tano again looked at the tickets and Quino asked her, "What is this about?" Tr. 4/10/90 at 22 and 25. Tano told them that she was investigating possible narcotics trafficking through the airport and wanted to interview people from certain incoming flights. Quino then responded that he did not know anything about narcotics. Tr. 4/10/90 at 23.

Tano asked Quino and Cachola for their names a second time, but they said nothing, looked at each other, looked at Tano then backed 2 to 4 feet away from her. Tr. 4/10/90 at 23. Tano asked them if they were carrying narcotics and Quino asked Tano again what this was about, to which Tano responded that the police liked to interview people arriving on certain flights. Tr. 4/10/90 at 23-4.

Tano asked Quino if he was carrying narcotics. Tr. 4/10/90 at 24. Quino then stepped away from Cachola,

unzipped his own carry-on bag, and opened it up, displaying its contents to Tano in an abrupt way stating that he did not have any narcotics, and Tano merely looked quickly at the bag's contents. Tr. 4/10/90 at 24; Tr. 8/15/90 at 43-4; Tr. 9/21/90 at 36. Tano then asked Cachola if he was carrying narcotics, and Cachola responded "No." Tano then asked Cachola if he minded her looking through his bag and Cachola responded by handing Tano his unzipped bag. Tr. 4/10/90 at 24; Tr. 9/21/90 at 36. As Tano examined the contents of the bag, Cachola and Quino backed about 6 feet away from her, and Tano thought they were going to leave her holding the bag. Tr. 4/10/90 at 24-5; Tr. 8/15/90 at 46. After looking through the bag briefly, Tano walked up to Cachola and handed him the bag which he took. Tr. 4/10/90 at 25; Tr. 8/15/90 at 47.

Tano then asked Cachola and Quino if they had narcotics on their persons to which they both simultaneously responded "No," in a very dramatic way, while continuing to back away from Tano to look around, and Tano thought they were going to leave. Tr. 4/10/90 at 25; Tr. 8/15/90 at 48. About that time, Tano heard Sumaoang ask Galinato if he could pat Galinato down and Galinato asked Sumaoang to give him a break. Tr. 4/10/90 at 25, 51, 69. Sumaoang asked, "What?" and Galinato said, "Give me a break, man." Tr. 4/10/90 at 51. At the same moment, Tano had asked Cachola if she could pat him down but Cachola just looked at her without answering. Tr. 4/10/90 at 25-6; Tr. 8/15/90 at 49.

Suddenly, all three began running down the concourse, with Galinato first, followed by Quino and then Cachola. Tr. 4/10/90 at 26, 51-2; Tr. 8/15/90 at 49-50. Sumaoang pursued Galinato and Quino and as they ran, Quino and Galinato removed packets of narcotics which

had been attached to their bodies and threw them into potted plants near the airport exit. Tr. 4/10/90 at 55, 70, 71-2, 77, 78.

III.

DISCUSSION

A. THIS COURT MISAPPLIED RELEVANT LEGAL STANDARDS IN RULING THAT THE OFFICERS HAD"STOPPED" THE DEFENDANTS AT SOME UNDETERMINATE POINT IN TIME DURING THEIR ENCOUNTER.

It appears that this Court has concluded that officers can no longer even approach a member of the public "without any objective basis for suspecting them of misconduct." *See* Opinion at 14. The State submits that this conclusion reflects, and is the result of, a misapprehension of both the facts of this case as reflected in the record and the appropriate legal standards as they apply to the applicable facts.

1. Tano did not physically stop Quino.

In the "facts" portion of the Opinion, this Court states, "After observing the three men from a distance, both officers approached and stopped them." *See* Opinion at 3. The State submits that this factual determination is inconsistent with the vidence reflected in the record in this case and, therefore, appears to be the result of this Court's misapprehension of that evidence.

As reflected in the record citations discussed above, Galinato had walked with Cachola and Quino away from their arrival gate toward Gate 23. However,

Galinato eventually stopped walking of his own accord and began reading the flight arrival and departure gates. It was at this point that Sumaoang approached Galinato, identified himself as a police officer, and asked Galinato for permission to speak to him. Sumaoang did not cause Galinato to stop walking.

Similarly, Tano did not cause Quino to stop walking and to talk with her. Tano eventually caught up to Quino and while walking alongside Quino, she identified herself as a police officer and asked for his permission to speak with him. She continued talk with Quino as she walked with him until Cachola stepped in front of her and Quino, blocking their way, and causing them to stop walking. Quino was stopped by Cachola, not Tano. Tano did not cause Quino to stop walking.

Therefore, this Court's factual determination that Sumaoang and Tano approached and stopped the three men was erroneous as not supported by the evidence in the record.

2. At no time were Quino and his companions "stopped" by the officers as a matter of law.

The State submits that at no time during their brief encounter, from their initial approach onward, had the officers "stopped" Quino and his companions. As discussed above, the officers did not cause Quino, Galinato or Cachola to stop and talk with them. Galinato had already stopped walking when Sumaoang approached him. Tano was walking and talking with Quino when she and Quino were stopped by Cachola, who is not a party to this appeal. Moreover, the totality of the circumstances does not indicate that a reasonable person would not have felt free to leave the encounter.

This Court cites with approval and accepts the basic legal principles set out in *Florida v. Royer*, 460 U.S. 491 (1983) (a law enforcement officer does not violate the Fourth Amendment by merely approaching a person at random in a public place, by asking him if he is willing to answer some questions, by asking him questions if he is willing to listen, or by putting forth in evidence during a subsequent criminal proceeding the answers to those questions), and *Florida v. Bostick*, 501 U.S. ___, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (the Fourth Amendment permits officers to approach individuals at random at airports to ask questions and request consent to search luggage so long as a reasonable person understands that he can refuse to cooperate.) *See* Opinion at 12-3. This Court also recognizes that an officer does not have an affirmative duty to inform the person so approached that he is free to leave. *See* Opinion at 13-4. Thus, this Court has acknowledged that encounters between police and citizens do not necessarily require reasonable suspicion if they are voluntary, and do not necessarily offend the Fourth Amendment of the *United States Constitution* and Article I, Section 7 of the *Hawaii State Constitution*.

This Court also cites with apparent approval, and as the applicable standard to be applied here, the "reasonable person" test as enunciated in *United States v. Mendenhall, supra* at U.S. 554, L.Ed.2d at 509 ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if in view of all of the circumstances surroundinq the incident, a reasonable person would believe that he was not free to leave.") (emphasis added) and also reaffirmed the "reasonably prudent person" test enunciated in *State v. Tsukiyama*, 56 Haw. 8, 12, 525 P.2d 1099, 1102-3 (1974) as being substantially consistent with *Mendenhall* and controlling in this case. *See* Opin-

ion at 8-9. Both *Mendenhall* and *Tsukiyama* discuss the examples of the kind of police conduct which may lead a reasonable person to believe he is not free to leave the police encounter, such as whether the officer in any way physically restrained the person from leaving or touched the person, the number of officers present, whether the officer's questioning, either in language or tone, was overbearing or harassing, whether threats or a weapon were used. *See Mendenhall, supra; Tsukiyama, supra.*

However, this Court has appeared to have misapplied these principles to the facts of the instant case in reaching a conclusion which is inherently inconsistent with other portions of the Opinion as well as legal authority which this Court appears to cite as controlling.

a. At no time was the encounter between Quino and Tano a "stop."

To avoid the application of the legal principles and authorities discussed above to the instant case, this Court determined that Tano's initial encounter with Quino, during which she identified herself and asked him to speak with her, was a stop and that Quino spoke with Tano involuntarily, thereby requiring that Tano could have only approached Quino if she had reasonable suspicion, which she did not have. This Court appears to be saying that the officers intentionally mislead Quino and his companions into agreeing to speak with them, attributing some sort of "bad" intent to the officers in stating that ". . . the officers were concealing their investigative objective precisely to gain Quino's 'consent,'" labelling this a "material nondisclosure," then sanctioning the officers for this alleged act of concealment.

As to whether Tano's encounter with Quino constituted a "stop," this Court appears to distinguish *Tsukiyama* from the instant case on its facts to justify the

result of the instant Opinion. However, the distinctions made by the Court are incorrect.

For example, this Court found the officer's behavior in *Tsukiyama* less objectionable because in that case, the 10 uniformed officers encountered the defendant as his seven companions on a public street while on routine patrol. In contrast, in this case, only two officers, in civilian clothes, approached three men in a public airport concourse during their regular duties, albeit with the subjective intent of conducting a narcotics investigation. *See* Opinion at 9-10.

In addition, this Court looks to the subjective beliefs or intentions which Tano may have possessed at the time she approached Quino in applying the objective "reasonable person" standard to the facts of the instant case. In so doing, this Court appears to have overlooked the fact that in *Tsukiyama*, the Hawaii Supreme Court declined to apply such a subjective standard, expressly disregarding the officer's testimony regarding his subjective intentions at the time of the approach as not being relevant to the objective "reasonable person" standard. *Tsukiyama*, 56 Haw. at 12, 525 P.2d at 1102. The *Tsukiyama* Court applied a "reasonably prudent person" standard against the totality of circumstances, without consideration of the officer's subjective perspective, to determine whether a "seizure" had occurred. *See Tsukiyama, supra*. In this respect, this Court appears to have impliedly overruled *Tsukiyama*, or at least eviscerated that decision, by including factors in its analysis expressly excluded from the *Tsukiyama* analysis, i.e. the subjective beliefs of the officers.

Moreover, the State submits that the overall facts in the instant case are analytically consistent with

Tsukiyama, and therefore, do not support the result of this Opinion.

In *Tsukiyama*, the officers were on patrol on a public thoroughfare when they observed the defendant and his companions and decided to approach them. Similarly, in this case, Tano and Sumaoang were on routine drug interdiction patrol on the public concourse of a public airport when they observed Quino and companions and decided to approach them. In both cases, although the officers may have approached the respective defendants with specific law enforcement objectives in mind, in neither case were these objectives in any way communicated to the defendants at the time of the officers' approach. Again, factually, any subjective intentions which the officers may have been entertaining were simply not part of the total circumstances of which a reasonable person would be aware, and are thus not relevant to a determination of whether a reasonably prudent person felt free to leave.

This Court acknowledges that in Tano's mere approaching of Quino and asking him if she could speak with him for a few minutes, she was "starting an apparently 'innocuous conversation'" with him. *See* Opinion at 11. Objectively reviewed, Tano's approach of Quino and her initiation of a conversation with him was innocuous and, thus, did not deprive Quino of an ability to voluntarily consent to the encounter.

This Court also looks at other conduct by Tano and the surrounding circumstances, comparing them against *Tsukiyama* to reach an inconsistent result, in spite of the fact that the circumstances of this case are far more innocuous than in *Tsukiyama*.

For example, in *Tsukiyama*, 10 uniformed officers converged upon 8 men on a public street at 1:00 a.m. In

contrast, in the instant case two police officers in civilian attire approached 3 men in a public place in the presence of other passengers at about 10:40 in the evening. In fact, Tano, a single female officer approached two males and walked and talked with them along a public thoroughfare, identifying herself and asking for their permission to speak with them. Thus, Tano's approach in this case was even less intrusive than that of the officers in *Tsukiyama*. In this case also, as in *Tsukiyama*, there is no evidence that Tano in any way restrained Quino from leaving. The State submits that fewer officers, in a less intimidating environment, in less intimidating attire, should enhance the determination of voluntary consent, not undermine it.

Similarly, as the objective *Tsukiyama* test does not consider the subjective intent of the officer, it necessarily precludes the subjective concerns of the person being approached. Nonetheless, in applying this standard to the facts of this case, this Court looks at what a reasonable person in Quino's position would have believed. *See* Opinion at 12. This Court conducted an analysis of the officers' conduct from the subjective perspective of a person who was, in fact, committing a crime. The State submits that this too reflects a misapprehension of the applicable standards in this case. As stated by the United States Supreme Court:

> We do reject, however, Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the "reasonable person" test presupposes an innocent person.

Florida v. Bostick, supra at 115 L.Ed.2d 400; *see also United States v. Royer*, 460 U.S. 491, 519 n.4, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); accord *Michigan v. Chesternut*, 486 U.S. 567, 574, 108 S.Ct. 1975, 100 L.Ed.2d 565, 572 (1988) ("This 'reasonable person' standard also insures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.")

In summary, this Court erred in considering Quino's particular circumstance as a law violator in applying the *Tsukiyama* "reasonable person" standard in this case. This Court should have analyzed Tano's conduct and surrounding circumstances from the standpoint of an "innocent" person who enters into a police encounter with no predisposition to avoiding police apprehension, and without consideration of any subjective uncommunicated intent Tano may have possessed. Tano's approach of Quino, during which she identified herself and asked him if she could speak with him, was in fact, as this Court acknowledges innocuous. Tano had done nothing to stop Quino, either physically or by show of authority. Quino's agreement to speak with her was, therefore, a voluntary consent.

b. Quino voluntarily agreed to speak with Tano.

This Court implies that Quino's consent could have been deemed voluntary only if Tano had told him she was investigating narcotics trafficking when she identified herself, and he continued to talk with her. *See* Opinion at 13-14. However, this Court is once again improperly looking to the subjective beliefs of the individual encountered and not that of a reasonable innocent person. The fact that Quino may have felt personally intimidated because he was, at the time, carrying a class

A quantity of cocaine on his person and was acting out of a consciousness of guilt, is equally excluded from a consideration of the totality of the circumstances. If this were a consideration, the mere presence of any officer would be enough to create an intimidating environment and so long as he was a law violator, he could avoid detection. Conversely, if the person approached is innocent, it becomes irrelevant to to the question of whether that person felt free to leave whether that person is aware of the officer's specific duty assignment.

As to the officer's alleged "bad" intent, the State submits that the Court's analysis in this respect is incorrect as there is nothing in the record to support this Court's determination that the officers were concealing anything from Quino and companions or were, in any way, proceeding with a dishonest motive. Further, to the extent that such a finding, impinging the officers' honesty, necessarily turns upon a credibility determination, this Court has consistently deferred to the credibility findings of the lower court who, as the finder of fact, was in the best position to assess the officers' credibility as they testified below. *See State v. Moore*, 62 Haw. 301, 306, 614 P.2d 931, 934-5 (1980).

c. Reasonable suspicion developed during the course of Quino's voluntary conversation with Tano.

This Court appears to be ruling that even if Tano's initial encounter with Quino and preliminary questions did not require reasonable suspicion, at some undetermined point in time, this voluntary encounter became a "stop," without also determining whether, or at what point in time, Tano may have had reasonable suspicion to in fact "stop" Quino. *See* Opinion at 11-12. The State submits that an analysis of the constitutionality of this

encounter simply cannot include a determination of whether a stop occurred without more specificity as to what point in time such a stop may have occurred, and without also looking at whether the stop was constitutionally justified because of the presence of reasonable suspicion.

As previously discussed, because Tano had not physically stopped Quino from walking (Quino having been stopped by Cachola), a reasonable innocent person would have felt free to leave Tano's presence during her conversation with Quino and their encounter was voluntary. The State continues to submit that a reasonable innocent person who had been thus approached and questioned by Tano would not have felt prohibited from leaving and if they remained, they would have remained as a matter of choice rather than Tano's conduct. Any inhibition which Quino and Cachola may have demonstrated during their encounter with Tano was the sole result of their subjective knowledge that they were speaking to an officer while carrying illegal narcotics, and not a part of the "reasonable person" analysis.

At this point, Tano had identified herself and both Quino and Cachola expressly agreed to speak with her. She asked Quino and Cachola if they had disembarked from the San Jose flight, an innocuous question. Cachola, responding for both of them, said they had. She asked Quino and Cachola if they were visiting or staying in Hawaii, again, another innocuous question. Cachola, again responding for both, said that this was their first trip to Hawaii. She then asked to see their airlines tickets and Quino responded that his ticket was in Cachola's bag and Cachola handed their tickets to Tano.

The State submits that this also was a permissible question and up to this point in time, Tano had made

absolutely no show of authority which might have otherwise tainted the voluntariness of this encounter. *See Royer*, 560 U.S. at 501-2, 75 L.Ed.2d at 239. Nothing in the record suggests that Quino had an objective reason to believe he was not free to leave.

Therefore, Tano obtained the tickets from Quino and Cachola as the result of a consensual encounter with them and without having "stopped" them. However, upon examining the tickets, Tano learned that they were one-way from San Jose, purchased for cash on that day for Marino "Quicho" and Rudy "Calsona." Although Tano had no information as to how long Quino and Cachola were staying in Hawaii or that Quicho and Calsona were not their real names, through training and experience she was also familiar with the fact that drug couriers often purchased tickets with cash from drug source cities such as San Jose, on the date of travel, under fictitious names.

Up to this point in time, Tano had learned that the three were travelling from a city known to be a source of illegal narcotics, Galinato had a bulge on his back above his belt line which drew Tano's attention to the three men to begin with, Cachola was holding the tickets for all three men, which were one-way tickets purchased for cash that day, and Cachola's hand was shaking when he handed the tickets to Tano.

Therefore, although the State maintains this was not a stop, all of the information received by Tano from her first observation to review of the tickets now cumulatively amounted to reasonable suspicion to justify her stopping Quino and Cachola, and the fact that Tano may not have realized this, does not nullify the reasonable suspicion which existed at the time. *See Scott v. United States*, 436 U.S. 128, 138, 56 L.Ed.2d 168, 178, 98 S.Ct. 1717 (1978) ("[T]he fact that the officer does not have the

state of mind which is hypothecated by the reasons which provide the legal justification of the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.") (emphasis added). Thus, even if Tano's conversation with Quino after her initial approach and preliminary questions is construed as having become a stop, because of the presence of information amounting to reasonable suspicion, Quino's rights were not violated.

Subsequently, Tano asked to see their hand carried bags and both Quino and Cachola responded by displaying their bags to Tano for inspection as they began to walk away. By now, Tano's suspicions were mounting because Quino and Cachola were panicking in anticipation of the discovery of their crime and their apprehension. Ultimately, Quino fled, abandoning the evidence in the process.

In summary, although Tano's encounter with Quino was not a stop, there was an abundance of information which, reviewed objectively, established the presence of reasonable suspicion which would have justified a stop. However, this Court appears to be ruling that even if Tano's initial encounter with Quino and preliminary questions did not require reasonable suspicion, at some undetermined point in time, the voluntary encounter became a stop.

This Court failed to conduct the concomitant analysis to determine whether, or at what point in time, Tano may have had reasonable suspicion to stop Quino. Such an analysis must be done based on the objectively reviewable circumstances which existed at the time, thus enabling this Court to determine the presence of reasonable suspicion at that point in time.

B. IN ITS ANALYSIS, THIS COURT OVERLOOKED THE BALANCING OF THE NEEDS OF LAW ENFORCEMENT TO FUNCTION EFFECTIVELY FOR THE SAFETY OF ALL WITH THE NEEDS OF THE INDIVIDUAL TO BE FREE OF UNREASONABLE SEARCH AND SEIZURE.

The State notes that this Court appears to be ruling that police officers can never approach a citizen in a public area "without an objective basis for suspecting them of misconduct." *See* Opinion at 14. If this ruling is then carried to its logical conclusion, it appears that this Court has determined that whenever police officers "possess a need or desire to initiate an encounter with a private individual they must be prepared to seize him or else do nothing." *See People v. DeBour*, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976). Moreover, such an approach virtually ignores the needs of law enforcement, needs which have been traditionally considered in search and seizure analysis.

In *Mendenhall*, the United States Supreme Court stated:

> The purpose of the Fourth Amendment is not to eliminate all contact between the police and citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."

Mendenhall, 446 U.S. at 553-4, 64 L.Ed.2d at 509.

The United States Supreme Court then conducted such a balancing between law enforcement's needs with those of the citizenry and stated:

> [C]haracterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unresolved. In short, the security of all would be diminished"

United States v. Mendenhall, 446 U.S. 544, 554, 64 L.Ed.2d 497, 509, 100 S.Ct. 1870 (1980) (citations omitted).

The State submits that as a matter of fairness and common sense, such a balancing must also be conducted in this Court's interpretation of Article I, Section 7 of the *Hawaii State Constitution*. Without such a balancing, a proper decision cannot be rendered regarding what is or is not "reasonable" under a particular set of circumstances.

However, absolutely no discussion within this Opinion indicates that the balancing between the needs of law enforcement and the citizenry was conducted or considered by this Court. The State submits that because this process was overlooked in this Court's analysis of the issues presented in this appeal, the Opinion is, in effect, incomplete and an incorrect application of the law to the facts in this case.

IV.

CONCLUSION

In rendering its Opinion on October 28, 1992 in the above-entitled case, this Court misapprehended salient facts, and misapplied applicable standards to these misapprehended facts. Moreover, in misapplying these standards, this Court appears to have considered matters which were either not reflected in the record, or were not, as a matter of law, properly a part of the application of those standards, or did not conduct a complete analysis resulting in an incomplete, and thus, incorrect decision.

Based of the above argument, the State respectfully requests this Court to reconsider its Opinion of October 28, 1992. The State also seeks an opportunity to discuss these issues further with this Court through oral argument.

Dated at Honolulu, Hawaii: November 9, 1992.

Respectfully submitted,

STATE OF HAWAII
Respondent-Appellee

By KEITH M. KANESHIRO
Prosecuting Attorney

By /s/ Charlotte J. Duarte
Deputy Prosecuting Attorney
City and County of Honolulu

NO. 15239

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
	)
Respondent-Appellee,	) CERTIORARI TO THE
	) INTERMEDIATE COURT
v.	) OF APPEALS
	)
FERDINAND Q. QUINO,	) HONORABLE HERMAN
	) LUM
Petitioner-Appellant,	) Chief Justice
	) HONORABLE RONALD
and	) MOON
	) HONORABLE ROBERT
HENRY TUGCAY	) KLEIN
GALINATO,	) Justices
	) and
RAUL CENTORNA	) HONORABLE YOSHIMI
CACHOLA,	) HAYASHI
	) Retired Justice
Defendants.	) (Assigned by Reason of
_____	) Vacancy)

AFFIDAVIT OF CHARLOTTE J. DUARTE

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

CHARLOTTE J. DUARTE, being first duly sworn on oath, deposes and says:

1. She is a Deputy Prosecuting Attorney for the City and County of Honolulu, duly sworn to practice law within the State of Hawaii, and assigned to represent the interests of Respondent-Appellee, STATE OF HAWAII (hereinafter "State") in the above-entitled case;

2. In its Opinion of October 12, 1992, this Honorable Court found, "After observing the three men from a distance, both officers approached and stopped them." *See* Exhibit "A," attached to the Memorandum in Support of Motion for Reconsideration (hereinafter "Opinion at ___") at 3;

3. Affiant has reviewed the records and files in the instant case and is of the information and belief that the finding cited in Paragraph 2 above is not consistent with the evidence as reflected in the Record on Appeal;

4. In its Opinion, this Honorable Court also appears to have misapplied the test which it determined was applicable in this jurisdiction in determining that "once the stop had turned from general to inquisitive questioning, a reasonable person in Quino's position would not have believed that he was free to ignore the officer's inquiries and walk away." *See* Opinion at 12;

5. Affiant has reviewed the legal authority which this Court cites as providing the appropriate test in this case, i.e. *State v. Tsukiyama*, 56 Haw. 8, 12, 525 P.2d 1099, 1102 (1974) and *United States v. Mendenhall*, 446 U.S. 554 (1980), and is of the belief that the "reasonably prudent person" test of *Tsukiyama* and the "reasonable person" test in *Mendenhall* has been incorrectly applied;

6. In its Opinion, this Court also found "the officers concealed their investigative objective precisely to gain Quino's 'consent.'" *See* Opinion at 14;

7. Affiant has reviewed the records and files in the instant case and is of the information and belief that the finding cited in Paragraph 6 above is not consistent with the evidence as reflected in the Record on Appeal and also represents a misapplication of the legal standards relevant to this case.

Further Affiant sayeth naught.

/s/ Charlotte J. Duarte

Subscribed and sworn to before me
this 9th day of November, 1992.

/s/ Delanie D. Prescott-Tate
Notary Public, State of Hawaii

My commission expires on: 9-25-95

NO. 15239

(CRIMINAL NO. 90-0721)

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	CRIMINAL NO. 90-0721
Respondent-Appellee,	CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
v.	
FERDINAND Q. QUINO,	HONORABLE HERMAN LUM Chief Justice
Petitioner-Appellant,	HONORABLE RONALD MOON
and	HONORABLE ROBERT KLEIN Justices and
HENRY TUGCAY GALINATO,	HONORABLE YOSHIMI HAYASHI Retired Justice (Assigned by Reason of Vacancy)
RAUL CENTORNA CACHOLA,	
Defendants.	

CERTIFICATE OF GOOD FAITH

I hereby certify, as the attorney representing Respondent-Appellee, STATE OF HAWAII, that the

foregoing Motion for Reconsideration is presented in good faith and not for purpose of delay.

Dated at Honolulu, Hawaii: November 9, 1992.

Respectfully submitted,

STATE OF HAWAII
Respondent-Appellee

By KEITH M. KANESHIRO
Prosecuting Attorney

By /s/ Charlotte J. Duarte
Deputy Prosecuting Attorney
City and County of Honolulu

APPENDIX "D"

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII, Respondent-Appellee, v.
FERDINAND Q. QUINO, Petitioner-Appellant, and
HENRY TUGCAY GALINATO and
RAUL CENTORNA CACHOLA, Defendants

NO. 15239

MOTION FOR RECONSIDERATION

(CRIMINAL NO. 90-0721)

November 19, 1992

LUM, C.J., MOON, KLEIN, LEVINSON, JJ., AND
RETIRED JUSTICE HAYASHI*,
ASSIGNED BY REASON OF VACANCY

Respondent-appellee's motion for reconsideration filed November 9, 1992, is hereby denied.

Charlotte J. Duarte,
Deputy Prosecuting
Attorney,
on the motion

/s/ Herman T.F. Lum
/s/ Ronald T.Y. Moon
/s/ Robert G. Klein
/s/ Steven H. Levinson

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*Retired Associate Justice Hayashi's temporary assignment to this court expired prior to the filing of this order. See HRS § 602-10 (1985).

APPENDIX "E"

NO. 15239

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
	)
Respondent-Appellee,	) APPEAL FROM THE
	) JUDGMENT; GUILTY
v.	) CONVICTION AND
	) SENTENCE;
FERDINAND Q. QUINO,	) NOTICE OF ENTRY;
	) FILED MARCH 6, 1991
Petitioner-Appellant,	)
	) FIRST CIRCUIT COURT
and	)
	) HONORABLE
HENRY TUGCAY	) WENDELL K. HUDDY
GALINATO and RAUL	) HONORABLE THOMAS
CACHOLA,	) K. KAULUKUKUI, JR.
	) HONORABLE MICHAEL
Defendants.	) A. TOWN
	) HONORABLE EVELYN
	) B. LANCE
	) Judges
_____	)

APPLICATION FOR WRIT OF CERTIORARI

and

APPENDIX "A"

OFFICE OF THE PUBLIC DEFENDER
RICHARD W. POLLACK 2430
PUBLIC DEFENDER 3401-0
BY: THEODORE Y.H. CHINN
DEPUTY PUBLIC DEFENDER
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ATTORNEYS FOR
PETITIONER-APPELLANT

(CERTIFICATE OF SERVICE ATTACHED)

NO. 15239

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
	)
Respondent-Appellee,	) APPEAL FROM THE
	) JUDGMENT; GUILTY
v.	) CONVICTION AND
	) SENTENCE; NOTICE OF
FERDINAND Q. QUINO,	) ENTRY; FILED
	) MARCH 6, 1991
Petitioner-Appellant,	)
	) FIRST CIRCUIT COURT
and	)
	) HONORABLE WENDELL
HENRY TUGCAY	) K. HUDDY
GALINATO and RAUL	) HONORABLE THOMAS
CACHOLA,	) K. KAULUKUKUI, JR.
	) HONORABLE MICHAEL
Defendants.	) A. TOWN
	) HONORABLE EVELYN
	) B. LANCE
	) Judges
	)

APPLICATION FOR WRIT OF CERTIORARI

Petitioner FERDINAND Q. QUINO (Petitioner or QUINO), Defendant-Appellant in the Intermediate Court of Appeals (ICA), pursuant to Rules 31 (e), Hawaii Rules of Appellate Procedure ("HRAP"), respectfully

prays that a writ of certiorari be issued to review the Opinion of the ICA filed on May 7, 1992. (Appendix "A").

JURISDICTION

The decision of the ICA in No. 15239 ("Opinion") was filed on May 7, 1992. Pursuant to Rule 31(e), HRAP, this Application may be filed on or before May 17, 1992. This Court has jurisdiction to entertain this Application pursuant to HRS § 602-5 (1985 and Supp. 1991) and § 602-59 (1985).

QUESTION PRESENTED

1. Whether the ICA gravely erred in promulgating a new rule of law which provides that "seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have reasonably believed that, if he or she started to leave, the police would attempt to physically restrain him or her from leaving".

2. Whether the ICA gravely erred in holding that Petitioner "did not have the right to be advised that they had a right not to answer the officers' questions and to leave" or that they had a right not to consent to a search of his property or person.

3. Whether the ICA grievously erred in failing to address whether there was a show of authority by the police such that a reasonable person in Petitioner's position would have believed that he was not free to leave.

4. Whether the rule of law in Hawaii for "walk and talk" airport encounters between police and citizens should be that the police must have specific and articulable facts to believe criminal activity was afoot before the police may approach and interrupt the travellers in their passage through the airport.

5. Whether there was specific articulable and reasonable basis for the police to believe that Petitioner was committing a crime when Petitioner exercised his right to terminate his conversation with the police and to leave in a quick manner.

STATEMENT OF PRIOR PROCEEDINGS

On January 2, 1991, QUINO and Co-Defendant Henry Galinato (Galinato) were found guilty of violating HRS § 712-1241(1)(a)(i), Promoting a Dangerous Drug in the First Degree. [Transcript of Proceedings (TR) of 1/2/1991:2]. On March 6, 1991, QUINO was sentenced to a term of 20 years of imprisonment. (RA:179). QUINO is currently incarcerated. (RA:179).

A Notice of Appeal was timely filed on March 22, 1991. (RA: 195-200). The case docketed on May 1, 1991. Following the completion of the appellate briefing process, the instant appeal was assigned to the ICA which affirmed the conviction.

STATEMENT OF THE CASE

During the evening of April 3, 1990, Officers Tanya Tano and Harold Sumaoang of the Honolulu Police Department were operating in plainclothes and assigned to investigate narcotics trafficking at the Honolulu International Airport. [Transcripts of the Preliminary Hearing held on 4/10/1990 (TR I) (Received into evidence during Motion to Suppress Evidence as Defendant Galinato's Exhibit A, *see* Exhibit List for 8/15/1990 and 9/21/1990 attached to Record on Appeal): 10-11, 12]. At about 10:30 p.m., Tano and Sumaoang decided to monitor an incoming American Airlines flight from San Jose. (TR I:11-12).

They were not employing any type of profile in deciding what type of suspect to look for. (TR I:30).

QUINO, Galinato and Raul Cachola (Cachola) were among the passengers deplaning. (TR I: 12). Tano observed a bumpy area in the back of Galinato's shirt above his beltline and decided, solely on this basis, along with Sumaoang to follow all three males. (TR I:13, 40). Tano didn't observe anything unusual about QUINO or Cachola but approached them because he assumed they were together with Galinato since they were walking together through the terminal in single file. [TR of 9/21/1990 (TR III): 13-14]. After following the males for a distance and observing nothing peculiar, Sumaoang approached Galinato and Tano approached QUINO and Cachola. (TR I:13, 41). At this time, Sumaoang did not suspect that any kind of criminal activity was taking place. (TR I:66). Tano showed her badge to QUINO and identified herself as a police officer. (TR I: 13). QUINO and Cachola, after looking at the badge, stopped walking. (TR I:16).

Officer Tano asked QUINO and Cachola if they minded if she spoke with them and they both answered "yeah."[1] (TR I: 16). Officer Tano then asked if they had gotten off the flight from San Jose and whether it was their first time in Hawaii. (TR I:16-17). Cachola answered these questions but QUINO chose not to respond. (TR

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[1] This was the question and the response as testified to by Officer Tano. (TR I:16). However, the Opinion stated that "Officer Tano asked Quino and Cachola if she could talk to them for a minute. They both said, '[Y]eah.'" Opinion at 2. Petitioner submits that his response was that he did mind talking to the officer. The question was ambiguous which results in an equally ambiguous response.

I:17). Officer Tano next asked to see their airline tickets (TR I:17). QUINO pointed to a black bag in Cachola's hand and said his ticket was in that bag. (TR I:17). As Cachola took the tickets out of his bag, he began to visibly shake as if he were nervous. (TR I:17). Officer Tano examined the tickets and noticed that they were oneway tickets, purchased the same date of the flight, and paid for in cash. (TR I:21-22). Nothing in the record of the case indicates that Tano ever returned the tickets to Cachola.

Officer Tano persisted and next asked Cachola and QUINO for identification. (TR I:22). This time, Cachola chose not to respond and QUINO told Tano that he didn't have it. (TR I:22). QUINO then inquired of Tano: "What is this about?" (TR I:22).

Tano replied by telling QUINO that they were investigating narcotics and they like to interview people from certain flights. (TR I:23). Responding to Tano's statement, QUINO told Officer Tano that he didn't know anything about narcotics. *Id.*

Tano refused to cease questioning, and asked for their names. (TR I: 23). Cachola and QUINO then began looking from side to side and backing away from Tano. *Id.* QUINO asked Tano a second time what this was all about and Tano responded by stating that they are interviewing people coming in on certain flights. (TR I: 23-24).

Tano then asked QUINO directly if he was carrying any narcotics. (TR I:23-24). QUINO, in response to her accusatory question, unzipped a duffle bag he was carrying, displayed the contents to Tano and told her he didn't have narcotics. (TR I: 24). Tano then asked Cachola if he was carrying any narcotics. *Id.* After Cachola answered "no," Tano asked him if she could look through his hand-carry bag. *Id.* He handed his bag to Tano who looked

through it. *Id.* When Tano handed Cachola's bag back to him, both Cachola and QUINO appeared to be excited. (TR I: 25).

Still unsatisfied, Tano then asked Cachola if he was carrying any narcotics on his person -- Cachola told her, "no." (TR I:25). Tano then asked Cachola if he minded if she pat him down. (TR I:25). Cachola didn't answer. (TR I:26). Tano did not inform Cachola or QUINO that they had a right to refuse the patdown. (TR III:24). At about the same time, Officer Sumaoang asked Galinato if he would mind having a patdown to which Galinato responded, "Give me a break.'" (TR I:26). Galinato, Cachola, and QUINO, at that point, all began to run. *Id.* Tano and Sumaoang immediately gave chase. *Id.* Tano caught up to Cachola and yelled, "stop," and grabbed onto his shirt. *Id.* They struggled approximately 30 feet from the initial point where QUINO, Cachola, and Galinato were stopped. (TR I: 27).

Officer Sumaoang, meanwhile took up the chase of QUINO. Sumaoang observed QUINO reach under the front portion of his shirt while running. (TR I:55). QUINO pulled out a yellow and whitish package and tossed it into a potted plant. *Id.* Sumaoang, with the assistance of airport security, apprehended QUINO within the airport. (TR I:56). Sumaoang then recovered from the area of the potted plant a package containing a crystal, rock-like substance. (TR I:57, TR III:36).

Throughout her encounter with QUINO, Tano never informed him that he was free to leave if he wanted to. (TR I:46). Tano and Sumaoang did not approach any other passengers off the flight. (TR I:74). Up to the point that he ran, Tano had no reason to believe that QUINO was involved in any criminal activity. (TR III:22).

On November 2, 1990, QUINO'S motion to sup-

press evidence was denied (TR IV: 61-66). Thereafter, following jury trial, QUINO was found guilty of Promoting a Dangerous Drug in the First Degree. (RA:179-180). On appeal, the ICA affirmed the conviction.

ARGUMENT

In the Opinion, despite the U.S. Supreme Court adopting, with the Hawaii Supreme Court concurring, the rule that a seizure occurs when, by means of physical force or a show of authority, a person's freedom of movement is restrained", the ICA promulgated a new and conflicting definition which states that "seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have reasonably believed that, if he or she started to leave, the police would attempt to physically restrain him or her from leaving". Opinion at 6. Further, the ICA held that Petitioner or his companion, who was requested by the police to consent to a search of his handbag and to a pat-down, "did not have the right to be advised that (he) had a right not to answer the officers' questions and to leave" Opinion at 8. Furthermore, the ICA held that the police does not need reasonable suspicion or specific and articulable facts before they may approach and interrupt a traveler at the airport on his way to his destination for purpose of engaging the traveler in a conversation or requesting permission for a search in order to recover incriminating evidence so that a arrest could be performed. Opinion at 9. Finally, the ICA held that, in the instant case, "the facts leading up to the spontaneous and rapid flight together with the fact of the spontaneous and rapid flight gave the police officers an articulable and reasonable

basis" for an investigative detention. Opinion at 10-11.

Petitioner submits that these holdings by the ICA are wrong.

1. The ICA erred in holding that Petitioner was lawfully stopped by the police officer in this case.

Although not all personal encounters and dealings between police and citizens involves "seizures", the U.S. Supreme Court has held that "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen", then a "seizure" has occurred. *United States v. Mendenhall*, 446 U.S. 544, 552, 64 L.Ed.2d 497, 508, 100 S.Ct. 1870 (1980) (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)); *accord, State v. Tsukiyama*, 56 Haw. 8, 12, 525 P.2d 1099 (1974).

> We adhere to the view that a person is "seized" only when, by means of physical force or a Show of authority, his freedom of movement is restrained . . . . The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."

Mendenhall, 446 U.S. at 553 (citations omitted) (emphasis added). Thus, the U.S. Supreme Court concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554 (footnote omitted); accord *State v. Tsukiyama*, 56 Haw. 8, 525 P.2d 1099.

The rule established by both the U.S. Supreme Court and the Hawaii Supreme Court is clear. A person is "seized" when, by means of physical force or a show of authority, his freedom of movement is restrained. Or a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

a. New definition of seizure.

The ICA has interpreted this rule to be that a "seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have reasonably believed that, if he or she started to leave, the police would attempt to physically restrain him or her from leaving." Opinion at 6. But this interpretation ignores the language promulgated by the U.S. Supreme Court and adopted by our Supreme Court. That is, seizure not only occurs when there has been physical force but also "when, by means of . . . a show of authority, (the person's) freedom of movement is restrained". *Mendenhall; Tsukiyama*. Clearly, the rule does not only require physical restraint or a reasonable belief that there would be an attempt at physical restraint. Instead, seizure also occurs when by means of a show of authority, the person's freedom of movement is restrained.

Moreover, the legal basis for this new definition is flawed as it rests on an erroneous legal grounds. In support of the new definition, the ICA stated that "in Hawaii, except in a motor vehicle, it is not unlawful to flee from a police officer seeking to have a voluntary conversation, to make an investigative stop/temporary detention, or to make an arrest". Opinion at 6. This statement is wrong. In *State v. Nakoa*, 72 Haw. 360, 817 P.2d 1060 (1991), the Hawaii Supreme Court held that

although the defendant, who has been placed under arrest, was not physically restrained, that is, handcuffed, he had his liberty restrained in that he was not free to leave because he had submitted to the custody and control of the arresting officer. Thus, the Supreme Court held that when the defendant ran from the arresting officer, there was sufficient evidence to sustain a conviction for escape. This case contradicts the statement in the Opinion as quoted above since Nakoa makes clear that it is unlawful to flee from a police officer seeking to make an arrest.

b. Show of authority.

The Opinion failed to analyze whether there was a "show of authority" such that Petitioner's freedom of movement was restrained. Nevertheless, Petitioner submits that the police officer's actions prior to the time Petitioner started running, exhibited a show of authority such that a reasonable person in Petitioner's position would not have believed that he was free to leave. The *Nakoa* opinion and the difficulty most citizens would have in ascertaining whether they are indeed free to ignore commands or requests by police officers show that it is extremely difficult to determine whether consent had been freely given in a particular situation. Thus, the fact that the police advise the citizen who was stopped that he is free to leave or free to not consent to a search or pat-down is highly significant in the determination of whether there was true consent, and not that the show of authority was such that the person stopped believed that compliance was required.

Unquestionably, there was a show of authority such that Petitioner's and his traveling companions' freedom of movement was restrained. Officers Tano and Sumaoang were operating in plainclothes on the evening

of QUINO'S arrest. (TR I: 12). To the ordinary citizen, being approached by a plainclothes officer would tell that person that he is being treated differently than a citizen who was approached by a uniformed officer. The public has more experience dealing with uniformed security personnel and police officers. The public perception of plainclothes officers is that they deal in covert police operations designed to uncover and investigate on-going and, many times, high-level criminal activity. QUINO submits that operating in plainclothes, in and of itself, injected an element of compulsion and coerciveness into the approach by Tano. Moreover, Tano and Sumaoang converged together on the three males. (TR I:13, 41). And as soon as Tano accosted QUINO, she displayed her badge and identified herself as a police officer. (TR I:13). The plainclothes, the display of the badge and the joint action by the two officers establish that Tano and Sumaoang exercised a significant show of authority in initially approaching QUINO. Indeed, in effect, no reasonable person would believe that they would be free to leave.

Moreover, Tano began by asking QUINO and Cachola a battery of questions which became increasingly accusatory. She first asked if they had gotten off the flight from San Jose and whether it was their first time in Hawaii. She then asked for their airline tickets. After examining the tickets given to her by Cachola, she asked for identification. QUINO asked "What is this about?" Tano responded that they were investigating narcotics. Even after QUINO stated that he didn't know anything about that, Tano continued her questioning by asking for their names. QUINO again asked what this was all about. Tano told him they interview people coming off certain flights.

Then the questioning took on a different tone. It was no longer request for information but instead the interrogation became a serious intrusion in the constitutionally protected right to be free from unreasonable search and seizure. At this point, the officers requested a search into the handbags and in addition a search or pat down of one of Petitioner's companions. The U.S. Supreme Court recognized that there must be a heightened judicial scrutiny where there is this show of authority because only police officer, because of their authoritative stature and power of arrest upon non-compliance with of a lawful order (Nakoa), can accost strangers on the street and request a search of handbags or a patdown of the person.

b. Notice of right to refuse to Consent.

In *Mendenhall*, the U.S. Supreme Court, found that where the police had expressly told the defendant that she may refuse to consent to a search, it was significant and highly relevant to the determination that there was consent.

> [I]t is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it. Although the Constitution does not require "proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search," such knowledge was highly relevant to the determination that there had been consent. And, perhaps more important for present purposes, the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the

> probability that their conduct could reasonably have appeared to her to be coercive.

Mendenhall, 446 U.S. at 558-559 (citation omitted). Although *Mendenhall* did not command that the officers must inform persons stopped that they are free to refuse to consent to a search, this fact is highly relevant and significant to any ruling as to whether or not there was a show of authority such that a reasonable person would believe that he was not free to leave. Accordingly, Petitioner submits that the ruling of the Opinion on this issue was in error.

Here, Officer Tano asked QUINO directly whether he was carrying any narcotics. (TR I: 24). QUINO then unzipped his bag and abruptly began showing Tano its contents. *Id.* Tano then asked Cachola if he was carrying any narcotics. *Id.* After Cachola answered "no," Tano asked him if she could look through his handcarry. *Id.* Cachola relinquished possession of his handcarry and Tano rummaged through it. *Id.* After handing Cachola's bag back to him, Tano asked him if he was carrying any narcotics on his person. (TR I:25). Cachola told her "no." (TR I:25). Tano's final question was directed to Cachola — she asked him whether he minded if she patted him down. (TR I:2 5).

Tano's actions and questions created a coercive environment from which no reasonable person could have felt free to walk away. Most significantly, Tano never informed either QUINO or Cachola that they were free to leave and didn't have to cooperate with them or answer any of their questions. Such notice would in effect offset the show of authority that Tano displayed in the initial encounter when she showed her badge and identified herself as a police officer. It would have neutralized this show of authority and placed both parties, Petitioner and

the police officers, on more of an equal footing so that Petitioner, under a reasonable person basis, would have feel free to leave, if it were his choice. However, by Tano's conduct and her lack of notice that QUINO may refuse to consent, she accosted QUINO and restrained his freedom to walk away. *Mendenhall*.

QUINO submits that Tano's and Sumaoang's show of authority, the language and tone of their questions, and their conduct transformed their approach of him into a seizure of his person within the meaning of the federal and state constitutions.

2. The ICA erred in holding that the police officer did not need reasonable suspicion to approach and question Petitioner and to request for a search and pat-down.

The ICA held that a "police officer does not need reasonable suspicion or the like to lawfully engage in a voluntary conversation with a person and, while conversing, to ask the person for voluntary answers to questions and for voluntary permission to pat-down search the person." Opinion at 9. The ICA cited *State v. Tsukiyama* as the authority for this proposition.

In *Tsukiyama*, the police were on patrol at 1 o'clock in the morning and observed three cars parked in a row with the lead car's hood raised and with 10 or 12 men gathered around this vehicle. During their investigation, the police saw a bicycle in the back seat in one of the parked vehicle and inquired as to whom the bicycle belonged to. Defendant stated that it belong to his sons. Police then requested an ID and defendant stated that his ID was in the glove compartment. The police then asked him to go and get it. When the defendant opened the glove compartment, a handgun was observed. *Tsukiyama* held that defendant was free to leave and that

there was no demand or order for identification by the police.

Here, unlike *Tsukiyama* where the police was investigating unusual conduct at 1 o'clock in the morning. The police were specifically investigating criminal activity involving drugs. They targeted Petitioner and his companions as possible suspects even though they were travellers at the airport like any other travellers. There was absolutely no evidence of any unusual, let alone suspicious, activity before the police approach Petitioner. In this situation there was a total lack of any specific and articulable facts pointing to criminal activity before the police approach, question, and stop Petitioner who was an arriving passenger like any other traveler at the airport. Petitioner submits that there must be reasonable suspicion before travelers may be accosted in the manner shown by the police in the instant case. To require otherwise would encourage arbitrary and capricious police conduct. The stops would be random and may be based on racial, ethnic, age group or other inarticulate hunches which are constitutionally impermissible. *Cf. Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (random stop of car without reasonable suspicion violates Fourth Amendment).

3. There was no specific articulable and reasonable basis for the police to believe that Petitioner was committing a crime when Petitioner exercised his right to terminate his conversation with the police and to leave in a quicker manner.

Finally, the ICA held that, in the instant case, "the facts leading up to the spontaneous and rapid flight together with the fact of the spontaneous and rapid flight gave the police officers an articulable and reasonable

basis to believe that Galinato and/or Quino were committing a crime and that an investigative stop/ temporary detention was appropriate." Opinion at 10-11.

Petitioner submits that he is faced with a Hobson's Choice if the law is that he is free to leave in a police encounter as in the instant case but that if he choose to leave in a quick manner then he is subject to arrest. Moreover, there had already been an investigatory stop during which the police officers found nothing which would have been evidence of a crime.

Thus, there is a total absence of any specific articulable and reasonable basis for the police to believe that Petitioner was committing a crime when Petitioner exercised his right to terminate his conversation with the police and to leave in a quick manner.

CONCLUSION

For the reasons stated above, Petitioner respecfully request that a writ of certiorari be granted to review the Opinion.

DATED: Honolulu, Hawaii: May 18, 1992.

Respectfully submitted,

OFFICE OF THE PUBLIC
DEFENDER
RICHARD W. POLLACK,
PUBLIC DEFENDER

BY: /s/ Theodore Y.H. Chinn
DEPUTY PUBLIC DEFENDER
ATTORNEYS FOR
PETITIONER-APPELLANT

APPENDIX "F"

NO. 15239

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
Respondent-Appellee,	)
v.	)
FERDINAND Q. QUINO,	)
Petitioner-Appellant,	)
and	)
HENRY TUGCAY GALINATO and RAUL CACHOLA,	)
Defendants.	)

ORDER

Petitioner Ferdinand Q. Quino's Application for Writ of Certiorari filed on May 18, 1992 is hereby granted.

Each party may, but need not, file a supplemental brief with respect to the issues raised in the application for certiorari. Any such brief shall contain no more than 15 pages and shall be filed no later than 30 days after the date of this order.

DATE: Honolulu, Hawaii, June 8, 1992.

FOR THE COURT:

/s/ Herman T.Y. Lum
Chief Justice

Theodore Y.H. Chinn,
Deputy Public Defender,
for the writ

APPENDIX "G"

NO. **15239**

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
Respondent-Appellee,	) APPLICATION FOR WRIT OF CERTIORARI
v.	)
FERDINAND Q. QUINO,	) INTERMEDIATE COURT OF APPEALS
Petitioner-Appellant,	) HONORABLE JAMES S. BURNS Chief Judge
and	) HONORABLE WALTER M. HEEN
HENRY TUGCAY GALINATO and	) HONORABLE PHILIP T. CHUN
RAUL CENTORNA CACHOLA,	) Associate Judges
Defendants.	)

SUPPLEMENTAL BRIEF
OF THE STATE OF HAWAII

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NO. **15239**

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
Respondent-Appellee,	) APPLICATION FOR WRIT OF CERTIORARI
v.	)
FERDINAND Q. QUINO,	) INTERMEDIATE COURT OF APPEALS
Petitioner-Appellant,	) HONORABLE JAMES S. BURNS Chief Judge
and	) HONORABLE WALTER M. HEEN
HENRY TUGCAY GALINATO and	) HONORABLE PHILIP T. CHUN
RAUL CENTORNA CACHOLA,	) Associate Judges
Defendants.	)

SUPPLEMENTAL BRIEF
OF THE STATE OF HAWAII

I.

STATEMENT OF JURISDICTION

Respondent-Appellee, STATE OF HAWAII (hereinafter "State") concurs with the jurisdictional statement of Petitioner-Appellant, FERDINAND Q. QUINO (hereinafter "Defendant").

II.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

A. **WHETHER THE INTERMEDIATE COURT OF APPEALS ERRED IN DETERMINING WHAT CONSTITUTES A "SEIZURE" CONSISTENTLY WITH PREVAILING CONSTITUTIONAL LAW PRINCIPLES?**

B. **WHETHER THE INTERMEDIATE COURT OF APPEALS ERRED IN DECIDING THAT DEFENDANT HAD NO RIGHT TO BE ADVISED BY OFFICERS THAT HE HAD A RIGHT NOT TO ANSWER QUESTIONS AND A RIGHT TO LEAVE?**

C. **WHETHER THE INTERMEDIATE COURT OF APPEALS ERRED IN DECIDING THAT OFFICERS DO NOT NEED REASONABLE SUSPICION OR THE LIKE BEFORE INITIATING A VOLUNTARY CONVERSATION?**

III.

STATEMENT OF PRIOR PROCEEDINGS

The State concurs with Defendant's Statement of Prior Proceedings.

IV.

COUNTERSTATEMENT OF THE CASE

The State submits that a thorough and comprehensive statement of the facts of this case are presented in the Counterstatement of the Case on pages 1 through 18 of the State's Answering Brief in the above-entitled case on September 16, 1991. Pursuant to the April 14, 1992 order of the Hawaii Intermediate Court of Appeals (hereinafter "ICA"), this case was consolidated with *State v. Galinato*, Supreme Court No. 15218. Therefore, the State also requests that this Court consider the recitation of facts presented in the Counterstatement of the Case on pages 2 through 15 of the State's Answering Brief filed in No. 15218 on September 18, 1991.

V.

ARGUMENT

A. THE ICA'S DECISION REGARDING WHAT CONSTITUTED A "SEIZURE" WAS CONSISTENT WITH PREVAILING CONSTITUTIONAL LAW PRINCIPLES.

Defendant first challenges the ICA's opinion claiming that the ICA devised a new definition for "seizure" in its opinion on page 6, claiming also that in so

doing the ICA ignored the United States Supreme Court's decision in *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980). However, Defendant ignores the entire and proper context of this limited portion of the ICA's opinion and puts forth his challenge outside that context.

At the outset of its opinion, the ICA observed that there are three kinds of police-person encounters: "First is the 'voluntary conversation.' Second is the investigative stop/temporary detention.' Third is the 'arrest.'" Opinion at 5. In determining that a voluntary conversation was not a seizure, the ICA stated:

> A seizure occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); State v. Tsukiyama, 56 Haw. 8, 525 0.2d 1099 (1974).

Opinion at 5 (emphasis added).[1]

This was a virtual verbatim recitation of the U.S. Supreme Court's conclusion in Mendenhall. The ICA went on to distinguish a "voluntary conversation", which is not a seizure, from an "investigative stop/temporary

---

[1] In *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed.2d 495, 509, 100 S.Ct. 1870 (1980), the United States Supreme Court stated:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances aurrounding the incident, a reasonable person would have believed that he was not free to leave."

detention", which "... requires reasonable and articulable suspicion as defined in *State v. Barnes*, 58 Haw. 333, 568 P.2d 1207 (1977)[;][,]", from an arrest which requires probable cause. *See* Opinion at 5.

Defendant does not assert that the ICA erred in those portions of its opinion discussed by the State above. Therefore, Defendant appears to accept the ICA's decision as reflected on page 5 of its Opinion as correct and unrefuted.

It was at this point in its Opinion that the ICA focused upon the pivotal phrase "free to leave." As noted by the ICA, in Hawaii, the phrase "free to leave" had not been explained. Without such an explanation, the definition of what constitutes a "seizure" would be difficult to consistently apply and the ICA looked upon this case as an opportunity to provide such an explanation.

The ICA rejected the option of reviewing the phrase from a purely legal perspective noting that "... it is difficult for lawyers to decide what is a reasonable nonlawyer's understanding under the law." Hawaii statutes were also of no assistance because, as noted by the ICA, under Hawaii statutes, it was not unlawful, except where the stop of a motor vehicle is concerned, for a person to run away from a police officer who is attempting to conduct a voluntary conversation, or an investigative stop/temporary detention or an arrest. The ICA further noted, on the other hand, that it was lawful for a police officer with legal grounds for an investigative stop/temporary detention or arrest to physically restrain a person from leaving.

In so noting, the ICA cited to *Hawaii Revised Statutes* (hereinafter "*H.R.S.*") Section 710-1026 providing for the offense of resisting arrest. This section prohibits the use of physical force, threats of physical

force or any means which creates the risk of bodily injury to the officer or others, to prevent an officer, acting under color of his official authority, from effecting an arrest. At this juncture, the State notes that Defendant also asserts as error, the ICA's statement that it is permissable for a person to run away from an officer who is attempting a voluntary conversation, investigative stop/temporary detention or arrest, citing to *State v. Nakoa*, 72 Haw. 360, 817 P.2d 1060 (1991) to support his claim of error. However, Defendant's reliance upon *Nakoa* in this context in misplaced.

In *Nakoa*, this Court addressed the question of whether the defendant should have been charged with the offense Resisting Arrest, a misdemeanor, under *H.R.S.* Section 710-1026, rather than with the felony offense of Escape under *H.R.S.* Section 710-1021. In determining that Nakoa had been properly charged with escape, this Court distinguished the two statutes, stating:

> [R]esisting arrest relates to a person who has not submitted to the custody and control of the arresting officer and who intentionally acts to prevent the officer from affecting an arrest. The escape statutes requires that the arrest be completed before the defendant is deemed to be in custody.

See State v. Nakoa, 72 Haw. at 367-8, 817 P.2d at 1064 (emphasis added).

Thus, under the facts in *Nakoa*, that defendant was properly charged with escape. Conversely, the facts in the instant case reflect that the questions to be resolved by the ICA arose at a time when the arrest of Defendant had not been completed. While Defendant may or may not have been seized, he definitely had not been arrested

until after he fled from police, had disposed of the narcotics he was carrying in the airport planter and been stopped by Honolulu police assisted by airport security. Therefore, Defendant's attack upon the ICA in this regard is obviously flawed and the ICA was, in fact, correct to look toward *H.R.S.* Section 710-1026 in its analysis.

In this context, the ICA determined that the phrase "free to leave" did not mean legally "free to leave", but must be defined and analyzed within a factual context to be functional. Thus, in an effort to clarify the phrase "free to leave" as used in *Mendenhall*, the ICA stated:

> We conclude that the phrase [free to leave] is used in a 'is it a fact' context and that a seizure occurs only if, in view of all the circumstances surrounding the incident a reasonable person would have reasonably believed that, <u>if he or she started to leave, the police would attempt to physically restrain him from leaving</u>.

Opinion at 6 (emphasis added).

Based on the ICA's analysis that a person may not be punished for running away from police if not under arrest, but that police may physically restrain a person from leaving if police had a legal basis for an investigative stop/temporary detention, the ICA concluded that a person was reasonable in his or her belief that he or she was not free to leave where he or she reasonably believed that if he or she attempted to leave, the police would attempt to physically restrain him from leaving. In short, the ICA was not creating a <u>new</u> definition of "seizure." Rather, the ICA was merely <u>clarifying</u> the definition of "seizure", which even Defendant accepts as correct, by explaining more clearly the phrase "free to leave".

Defendant further argues that the ICA erred because it is limiting a "show of authority" by police to circumstances where officers use physical force to restrain someone or that person is of the belief that physical restraint will be used. Either Defendant has misread both the ICA's opinion and *Mendenhall*, or he is attempting to put forth a kind of "straw man" argument, creating an error when none exists by comparing apples (show of authority) to oranges (a reasonable person's belief that officers may physically restrain him from leaving). Moreover, Defendant argues that the ICA failed to analyze whether there was a "show of authority" by police. To support his argument, Defendant recites facts which he claims undermines the ICA's conclusion. However, this argument also is belied by the contents of the ICA's opinion. Specifically, the ICA found that the circuit court was not clearly erroneous in its factual findings that during the incident the police officers "... did not by word and/or by act command or order Galinato and [Defendant] to do anything or not to do anything, [(ii)] requested and obtained permission to do what they did, and [(iii)] did not physically restrain [Defendant] and Galinato[.]" Opinion at 8. Defendant does not contend that the ICA applied an improper standard of appellate review in determining that the circuit court was not clearly erroneous.

However, Defendant does appear to argue that the ICA erred by not conducting an analysis of whether there was a "show of authority" by police in the instant case which restrained Defendant. Again, this Court can look to the *Mendenhall* court in determining whether Defendant is correct in his reading of the ICA's opinion. First, the State notes that the *Mendenhall* court stated:

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained.

United States v. Mendenhall, 446 U.S. at 553, 64 L.Ed.2d at 509, 100 S.Ct. at __.

Shortly thereafter, in determining whether specific actions by police created circumstances which might indicate a seizure, the *Mendenhall* court did not use the term "show of force". However, it is plain from its context that, the *Mendenhall* court was referring to a "show of force" when it stated:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several police officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled [citations omitted]. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

United States v. Mendenhall, 446 U.S. at 554-5, 64 L.Ed.2d at 509-10, 100 S.Ct. at ___.

All of the examples cited above do not involve the use of physical force by police. However, it is clear that they are examples of the kinds of showings of force which may lead a person to believe that if he attempted to leave, he would be physically prevented from doing so. Contrary to what Defendant appears to be arguing, a "show of

authority" by police does not automatically create a restraint upon an individual's freedom. Rather, whether police demonstrated a "show of authority" is a part of the total circumstances of this case which the ICA considered in determining whether Defendant reasonably believed that his freedom of movement was restrained.

The State notes that, at the outset of the ICA's opinion, the ICA listed the four salient facts of the case which are supported by the record and the factors determined by the circuit court which governed the outcome of Defendant's motion to suppress, i.e. 1. No reasonable suspicion is necessary for a police officer to walk up to an arriving passenger and converse with him; 2. Defendant and his two companions voluntarily consented to answering the officer's questions; 3. Defendant and his companions were not in detention or in custody during the question, were free to leave, and that the encounter was not an investigative stop/temporary detention; and, 4. Defendant and Galinato abandoned, and therefore had no reasonable expectation of privacy in, the items they threw into the plants as they were running. Opinion at 4. In this way, the ICA clearly laid out the factual parameters and salient issues to be addressed in its opinion.

Contrary to Defendant's assertions, the ICA did, in fact, demonstrate in its opinion that it had determined as part of the total circumstances whether officers had made a showing of authority during the officers' airport encounter with Defendant. The ICA in this case did not use the magic words "show of authority." However, it is evident by the context of the ICA's opinion, as it was in *Mendenhall*, that the ICA reviewed the record and the circuit court's decision in reaching its conclusions.

In reviewing this case, the ICA made it clear that the question of whether a reasonable person would have

believed that he or she was free to leave an encounter with police was not reviewable under the clearly erroneous standard of review.

> In any given factual situation, there can be only one right answer to the question of what a reasonable person would have believed or concluded. Therefore, that answer is reviewable under the de novo or right/wrong standard of appellate review.

Opinion at 6-7.

As previously argued herein, the specific factual findings of the circuit court were affirmed by the ICA. *See* State's Supplemental Brief at 6-7. The ICA then applied those factual findings to the question before it, i.e. whether a reasonable person would have believed that he or she was free to leave an encounter with police, and analyzed this application de novo. In so doing, the ICA considered substantially the same argument which Defendant puts forth here. As stated by the ICA:

> [Defendant] and Galinato contend that the police officers' calculated approach without any articulable facts to justify is constituted a seizure. They contend that the significant factors are that the questions were pretextual, accusatory, designed to detain and intimidate citizens at the airport, and specifically focused on the unlawful possession of narcotics; the officers did not advise the persons questioned that they were free to leave without answering the officers' questions; and the officers took physical possession of the airline tickets, holding the tickets while they continued the questioning.

Opinion at 7.

The defense contentions referred to by the ICA above are, in substance, the same factual arguments now raised by Defendant in the instant application. In essence, the ICA did necessarily conduct an analysis of the salient facts of the case to determine that there was a "show of authority" by officers which would lead Defendant to reasonably believe he was not free to leave. In affirming the circuit court, the ICA simply did not accepted as true and accurate Defendant's version of what occurred that day at the airport.

B. THE ICA PROPERLY DETERMINED THAT DEFENDANT DID NOT HAVE THE RIGHT TO BE ADVISED BY POLICE THAT THEY HAD THE RIGHT NOT TO ANSWER QUESTIONS AND TO LEAVE.

Defendant argues that he had a right to be informed that he was free not to answer the officers' questions and to leave, citing to *Mendenhall* in support of his argument. However, Defendant's reliance upon *Mendenhall* is misplaced and he cites to no other authority to support his argument.

It is the State's position that in merely approaching the defendants in a public place, identifying themselves as police officers and asking them if the officers could speak with them is not a "seizure" under any state or federal constitutional standard. Rather, this encounter between the officers and defendants is governed by the principles of "consensual encounter", referred to as a "voluntary conversation" by the ICA. Because this was not a seizure, Defendant was free to leave and a reasonable person in Defendant's shoes would

have known this. The mere fact that Defendant may have been harboring subjective anxieties because, at the time of the officers' approach, he was participating in illegal narcotics trafficking, is not the applicable standard here. Defendant did not need to be informed of something which he reasonably should have known, based on the totality of the circumstances surrounding this encounter. *See* State's Answering Brief at 19-22. As noted by the U.S. Supreme Court in *Mendenhall*:

> Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend on her having been so informed.

United States v. Mendenhall, 446 U.S. at 555, 64 L.Ed.2d at 610, 100 S.Ct. at ___.

In *Mendenhall*, the Court also rejected the argument that the only inference which can be drawn from the fact that the defendant made statements against her own interest to officers during their airport confrontation indicates that her cooperation was compelled. While she may have made statements that she later regretted, the issue was not whether her statements to police were self-protective, but whether they were voluntary. *United States v. Mendenhall, id.* Because her statements were voluntary, she reasonably knew she was free not to cooperate and officers were not compelled to tell her so. *United States v. Mendenhall, id.*

Defendant has failed to recognize that not every public encounter between citizens and police officers constitutes a "seizure" with Fourth Amendment implications and it is well established that a law enforcement

officer, under appropriate circumstances and in an appropriate manner, may approach a person for the purpose of investigating possibly criminal behavior even though there is no probable cause to make an arrest. *Terry v. Ohio*, 392 U.S. 1, 22, 20 L.Ed.2d 889, 906, 88 S.Ct. 1880, ___ (1968). Mere field interrogations by a police officer, without more, does not deprive an individual of his freedom to move. As stated by the Hawaii Supreme Court in *State v. Tsukiyama*, 56 Haw. 8, 525 P.2d 1099 (1974):

> While on the surface at least, there was nothing to indicate that defendant and his comrades were engaged in criminal activity or about to engage in such activity, there is no constitutional objection for a policeman merely to inquire of a person [at a public place] in a proper manner when the individual to whom the questions are addressed is under no compulsion to cooperate.

State v. Tsukiyama, 56 Haw. at 15, 525 P.2d at 1103.

In addition, in recognition of the need for "field" interviews, the Hawaii Supreme Court noted that in requesting the cooperation of persons, an officer cannot indicate that a person is legally obliged to provide information. *State v. Tsukiyama*, 56 Haw at 15-6, 525 P.2d at 1103-4. Moreover, there has been no case which imposes upon an officer the affirmative duty to inform the person approached the he or she is in not obligated to answer the officer's questions or is free to leave. Indeed, where such an encounter is voluntary such a warning requirement is nonsensical at best.

C. THE ICA PROPERLY RULED THAT OFFICERS DO NOT NEED REASONABLE SUSPICION OR THE LIKE TO ENGAGE IN A VOLUNTARY CONVERSATION WITH A PERSON.

Defendant appears to be arguing that the ICA misapplied *Tsukiyama* when it determined that officers do not need "reasonable suspicion or the like" before engaging a person in a voluntary conversation. To support his argument, he attempts to distinguish *Tsukiyama* from the instant case on its facts. However, in so doing, Defendant is either narrowly reading *Tsukiyama* and ignoring its plain language, or seeking the reversal of *Tsukiyama* as precedence in this jurisdiction.

Specifically, in *Tsukiyama*, while noting with disagreement that the dissent treated all encounters between police and citizens as a "detention" requiring reasonable suspicion, regardless of the circumstances, the Hawaii Supreme Court stated:

> This would practically require an officer to have grounds for an arrest before he could interrogate a person on the street, a test specifically rejected by the Supreme Court in *Terry*. Our conclusion is that mere field interrogation, without more, by a police officer does not involve "detention" in the constitutional sense so long as the officer does not deny the individual the right to move. Nor, if the dissent intends, could we accept the view that whenever a police officer, without suspicion of criminal activity, approaches an individual to ask him a question, there is a constitutional wrong

> which would require the suppression of contraband which the individual discards in response to the approach of the officer.

State v. Tsukiyama, 56 Haw. at 12, 525 P.2d at 1103.

In *Tsukiyama*, the Hawaii Supreme Court specifically rejected the position now being proffered by Defendant, upholding the fundamental principles enunciated in *Terry*, that a police officer does not need reasonable suspicion of criminal activity before initiating a voluntary encounter with persons so long as those persons remain free to leave. Based upon the record before the circuit court and the ICA, it was evident that the officers did not behave during their encounter with Defendant and his companions in a manner which tended to negate the voluntariness of the encounter.

It appears, however, that Defendant is seeking more than a ruling requiring reasonable suspicion as a prerequisite to a voluntary encounter, Defendant is also seeking a ruling precluding the use of information obtained by police during their voluntary encounter as part of their reasonable suspicion to later attempt to detain Defendant and his companions. However, in so arguing, Defendant again ignores the full factual context of this case.

Defendant claims that if he had the right to leave, why should his leaving be a part of the officers' reasonable suspicion justifying their chasing Defendant through the airport? However, this is not a case in which officers approached a person, asked to speak with them, and they said "no" and walked away. In this case, the officers observed the behavior of Defendant and his two companions, the inappropriate bulge under Galinato's shirt, their evident and inappropriate nervousness, their failure to respond in any way when asked for identifica-

tion, the way in which they looked at each other when asked for their names with expressions of panic, then backed away from the officers, how Defendant attempted to hide himself behind a third companion (Cachola) while one of the officers conducted a voluntary search of Galinato's bag.

All of these things, and more, were observed by the officers. Of course, their behavior can be explained now because Defendant and his companions were in fact engaged in illegal activity. It is the State's position that a person participating in the smuggling of illegal narcotics is, per se, unreasonable, and their subjective responses cannot be used as a gauge of what a reasonable person may believe regarding the reasonableness of an encounter. Thus, under the "reasonable person" standard, such responses as demonstrated by Defendant and his companions were inappropriate under the noncoercive circumstances of this encounter.

However, if all of that was not enough, when Galinato was asked whether he was carrying narcotics, all he had to say was "no" and walk away. Instead, he asked the officer, "Give me a break," and immediately all three simultaneously began to run. They did not just walk away. They ran away in the context of all of the other inappropriate behaviors they had already demonstrated, and one of them assaulted one of the officers in the process. They were not merely terminating a voluntary encounter. They believed they were fleeing from apprehension. However, their subjective beliefs as law-violators are not synonymous with the beliefs of a reasonable person.

Therefore, the officers did not need to have a reasonable suspicion before initiating a voluntary conversation with Defendant. However, once such an

encounter was initiated, the officers it was entirely permissable for the officers to consider the behavior of Defendant, including not merely their departure, but their flight from apprehension as reasonable suspicion to cause their further detention.

VI.

CONCLUSION

Based on the foregoing facts, authorities and arguments, the State respectfully requests this Court to affirm the May 7, 1992 opinion of the ICA.

Dated at Honolulu, Hawaii: July 7, 1992.

Respectfully submitted,

STATE OF HAWAII
Respondent-Appellee

By KEITH M. KANESHIRO
Prosecuting Attorney

By /s/ Charlotte J. Duarte
Deputy Prosecuting Attorney
City and County of Honolulu

APPENDIX "H"

NO. 15239

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
Respondent-Appellee,	) APPEAL FROM THE
	) JUDGMENT; GUILTY
v.	) CONVICTION AND
	) SENTENCE; NOTICE OF
FERDINAND Q. QUINO,	) ENTRY; FILED
	) MARCH 6, 1991
Petitioner-Appellant,	)
	) FIRST CIRCUIT COURT
and	)
	) HONORABLE
HENRY TUGCAY	) WENDELL K. HUDDY
GALINATO and RAUL	) HONORABLE THOMAS
CACHOLA,	) K. KAULUKUKUI, JR.
	) HONORABLE MICHAEL
Defendants.	) A. TOWN
	) HONORABLE EVELYN
	) B. LANCE
	) Judges
_____	)

SUPPLEMENTAL BRIEF TO APPLICATION FOR WRIT OF CERTIORARI

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PETITIONER-APPELLANT

(CERTIFICATE OF SERVICE ATTACHED)

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NO. 15239

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
	)
Respondent-Appellee,	) APPEAL FROM THE
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HENRY TUGCAY	) WENDELL K. HUDDY
GALINATO and RAUL	) HONORABLE THOMAS
CACHOLA,	) K. KAULUKUKUI, JR.
	) HONORABLE MICHAEL
Defendants.	) A. TOWN
	) HONORABLE EVELYN
	) B. LANCE
	) Judges
_____	)

SUPPLEMENTAL BRIEF TO APPLICATION FOR WRIT OF CERTIORARI

Petitioner FERDINAND Q. QUINO (Petitioner or QUINO) hereby files this Supplemental Brief pursuant to Order filed on June 8, 1992 granting Petitioner's Ap-

plication for Writ of Certiorari. With the exception of the argument presented in this brief, Petitioner rests on the arguments and authorities cited in the Opening Brief and the Application For Writ of Certiorari.

QUESTION ADDRESSED IN THIS SUPPLEMENTAL BRIEF

1. Whether the ICA gravely erred in promulgating a new rule of law in the Opinion filed on May 7, 1992 (hereinafter "Opinion") in the instant case, which provides that "seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have reasonably believed that, if he or she started to leave, the police would attempt to physically restrain him or her from leaving".

ARGUMENT

1. The new rule defining what constitutes a Fourth Amendment seizure was in error.

Although not all personal encounters and dealings between police and citizens involves "seizures", the U.S. Supreme Court has held that "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen", then a "seizure" has occurred. *United States v. Mendenhall*, 446 U.S. 544, 552, 64 L.Ed.2d 497, 508, 100 S.Ct. 1870 (1980) (citing *Terry v. Ohio*, 392 U.S. 1, 19, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968)); accord, *State v. Tsukiyama*, 56 Haw. 8, 12, 525 P.2d 1099, 1102 (1974).

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of

> movement is restrained. . . . The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."

Mendenhall, 446 U.S. at 553 (citations omitted) (emphasis added). Thus, the U.S. Supreme Court concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554 (footnote omitted); *accord State v. Tsukiyama*, 56 Haw. 8, 525 P.2d 1099.

The rule established by both the U.S. Supreme Court and the Hawaii Supreme Court is clear. A person is "seized" when, by means of physical force or a show of authority, his freedom of movement is restrained. Alternatively, a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

In the Opinion by the ICA in the instant case, despite the clear rule of law established by both the U.S. and the Hawaii Supreme Court, the ICA separately crafted a new rule to define what the ICA believes to constitute a Fourth Amendment seizure. Combining the well-established rule that a "seizure occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave" together with a new interpretation of the phrase "free to leave", the ICA held that "a seizure occurs

only if, in view of all the circumstances surrounding the incident, a reasonable person would have reasonably believed that, if he or she started to leave, the police would attempt to physically restrain him or her from leaving." Opinion at 6. There are a number of serious errors with this new rule.

First, this new rule places a too narrow and too restrictive definition on the phrase "free to leave". There are numerous circumstances where there is a show of authority by the police such that a person is not free to leave even though there is no fear that he or she will be physically restrained by the police if he or she did so. For example, it may be objectively reasonable for a person to believe that he is not "free to leave" when his airline ticket has been taken away from him and kept by the police. He may need the ticket to continue his travel, to obtain his luggage, for record purposes, or for other important reasons. Similarly, other personal items which the police may request to examine and then temporarily retain, such as handbags or other carry-on's, are personal properties which the traveller would expect to be returned by the police before continuing on his journey. Thus, where airline tickets or other personal items remains in the custody of the police, the person's freedom to leave has been substantially curtailed, despite that the fact that the person, under these circumstances may not believe that if he attempted to leave, the police would physically restrain him. Clearly, this illustrates that the new rule is restrictive and limiting

Second, the legal basis for this new definition is flawed as it rests on an erroneous legal ground. In support of the new definition, the ICA stated that "in Hawaii,

except in a motor vehicle, it is not unlawful to flee from a police officer seeking [1] to have a voluntary conversation, to make an investigative stop/temporary detention, or to make an arrest". Opinion at 6. Thus, the ICA assumes that where the police is "seeking" to make an arrest, it is lawful for the arrestee to flee from the police officer. This is a flawed statement for three reasons.

First, it is unlawful in certain situations to resist an arrest. The statute prohibiting such conduct states:

§ 710-1026 Resisting arrest. (1) A person commits the offense of resisting arrest if he intentionally prevents a peace officer acting under color of his official authority from effecting an arrest by:

(a) Using or threatening to use physical force against the peace officer or another; or

(b) Using any other means creating a substantial risk of causing bodily injury to the peace officer or another.

HRS § 710-1026. Thus, where a person flees from a police officer who was effecting an arrest and places the police officer in substantial risk of bodily injury, the person is acting in violation of this statute. Such a situation may occur where the fleeing person causes the police officer in pursuit to be in heavy traffic such that there is a substantial risk of bodily injury.

---

[1] Although the Opinion used the phrase "seeking . . . to make an arrest", there is no practical difference, in terms of police conduct toward the arrestee, between "seeking to make an arrest" and "making an arrest". The police in such a situation would be attempting to effectuate an arrest.

Second, although never stated, a logical and reasonable explanation for the ICA to base the new rule on this legal ground is that if the law in Hawaii is that it is never unlawful to flee from the police except in motor vehicle situations, then it follows that the person who does not leave after being stopped by the police must be consenting to the encounter. After all, the ICA assumes that the Hawaii law is such that it is not unlawful for the person to leave even in the face of an arrest. However, by this logic, it follows that the person is free to leave even where there has been a "show of authority" that he may not do so. But this is the exact definition as to what constitutes seizure according the U.S. and Hawaii Supreme Courts. Thus, under the new ICA rule, there could never be a Fourth Amendment seizure since a person is free to leave even where there has been a show of authority that he may not do so. Clearly, the ICA rule is seriously flawed.

Furthermore, this statement of Hawaii law is wrong. In *State v. Nakoa*, 72 Haw. 360, 817 P.2d 1060 (1991), the Hawaii Supreme Court held that although the defendant, who was placed under arrest but was not physically restrained, that is, handcuffed, he nevertheless had his liberty restrained in that he was not free to leave. Thus, the Supreme Court held that when the defendant ran from the arresting officer, there was sufficient evidence to sustain a conviction for felonious escape. This case contradicts the statement in the Opinion as quoted above since *Nakoa* makes clear that it is unlawful to flee from a police officer who has placed a person under arrest but has not yet physically restrained him.

CONCLUSION

Based on the above and the arguments and authorities presented in Petitioner's Application and the Opening Brief in the instant case, Petitioner respectfully requests this Court reverse the Opinion by the ICA in the instant case and, accordingly, reverse the lower court's order denying his motion to suppress evidence and remand the case to the lower court for further proceedings.

DATED: Honolulu, Hawaii: July 8, 1992.

Respectfully submitted,

OFFICE OF THE PUBLIC
DEFENDER
RICHARD W. POLLACK,
PUBLIC DEFENDER
BY: /s/ Theodore Y.H. Chinn
DEPUTY PUBLIC
DEFENDER

ATTORNEYS FOR
PETITIONER-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that 2 copy(ies) of the foregoing was served upon the following on July 8, 1992 by:

( ) Leaving the same at:

(X) Mailing the same, postage prepaid, addressed to:

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( )_____

_____

_____

_____

/s/ D. Lee
COURT RUNNER

APPENDIX "I"

NO. 15239

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	)	CRIMINAL NO. 90-0721
	)	
Plaintiff-Appellee,	)	CERTIORARI TO THE
	)	INTERMEDIATE
v.	)	COURT OF APPEALS
	)	
FERDINAND Q. QUINO,	)	HONORABLE JAMES S.
	)	BURNSLED
Defendant-Appellant,	)	HONORABLE WALTER
	)	M. HEEN
	)	HONORABLE PHILIP T.
	)	CHUN
	)	JUDGES
	)	
_____	)	

JUDGMENT ON APPEAL

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(CERTIFICATE OF SERVICE ATTACHED)

NO. 15239

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
	)
Plaintiff-Appellee,	) CERTIORARI TO THE
	) INTERMEDIATE
v.	) COURT OF APPEALS
	)
FERDINAND Q. QUINO,	) HONORABLE JAMES S.
	) BURNSLED
Defendant-Appellant,	) HONORABLE WALTER
	) M. HEEN
	) HONORABLE PHILIP T.
	) CHUN
	) JUDGES
	)
_____	)

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii, entered on October 28, 1992, the judgment of conviction is reversed, the order denying motion to suppress is reversed and the evidence is suppressed, the case remanded to circuit court for proceedings consistent with the Opinion, and it is further

ordered that the Intermediate Court of Appeals opinion be depublished.

Dated: Honolulu, Hawaii: December 8, 1992.

BY THE COURT:
/s/ L. Nakagawa
Clerk

APPROVED:

/s/ Robert G. Klein
Justice

CERTIFICATE OF SERVICE

I hereby certify that 1 copy(ies) of the foregoing was served upon the following on October 30, 1992 by:

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Honolulu, Hawaii 96813

( )_____

_____

_____

_____

/s/ J. Garrett
COURT RUNNER

APPENDIX "J"

NO. 15239

IN THE SUPREME COURT OF
THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 90-0721
	)
Respondent-Appellee,	) APPEAL FROM THE
	) JUDGMENT; GUILTY
v.	) CONVICTION AND
	) SENTENCE; NOTICE OF
FERDINAND Q. QUINO,	) ENTRY; FILED
	) MARCH 6, 1991
Petitioner-Appellant,	)
	) FIRST CIRCUIT COURT
and	)
	) HONORABLE
HENRY TUGCAY	) WENDELL K. HUDDY
GALINATO and RAUL	) HONORABLE THOMAS
CACHOLA,	) K. KAULUKUKUI, JR.
	) HONORABLE MICHAEL
Defendants.	) A. TOWN
	) HONORABLE EVELYN
	) B. LANCE
	) Judges
_____	)

ORDER DEPUBLISHING OPINION

Whereas, this court having filed an opinion on October 28, 1992 reversing the Intermediate Court of Appeals' opinion,

IT IS HEREBY ORDERED pursuant to Rule 2(a) of the Rules of the Intermediate Court of Appeals, that the opinion of the Intermediate Court of Appeals is depublished. The clerk of the court shall promptly notify the applicable publishing companies and shall take all other appropriate steps to ensure that the Intermediate Court of Appeals' opinion is depublished.

DATED: Honolulu, Hawaii: October 30, 1992.

FOR THE COURT:

/s/ Herman T.Y. Lum
Chief Justice

APPENDIX "K"

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THE COURT: All right. Thank you. All right. This

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is motion to suppress evidence which has been brought on behalf of the defendants who are here. There's a third defendant, Mr. Cachola, whose apparently hadn't been found.

This involves what has been called in the vernacular a Walk and Talk at the Airport. Several issues are raised in this particular case and I'll deal with them in order.

First issue that has been raised deals with the propriety of the approach and the encounter by the officers with the defendants. The law in this jurisdiction and the law in most jurisdictions that I have conversed with allows the officers to approach passengers without any reasonable suspicion or articulable facts to see whether the deplaning passengers would consent to engage in a consensual discussion with the officers.

In this regard I'm conversed with the law not only because I hear so many of these cases, but because the Criminal Law Reporter comes across my desk every week and I take great interest in the area of the so-called Walk and Talk because it's used through out the Country.

And the decision that is in on this particular issue are [sic] all consistent. No reasonable suspicion is neces-

sary for an officer to watch a passenger come off a flight and to walk up to

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a passenger and to encounter him initially. Now, whether or not there's a detention thereafter is another story. But the initial approach is proper and in this case it was proper.

It is argued to me that there occurred at some point after that a detention, but in this case the facts indicate otherwise. The defendants in this case agreed to talk to the officers about the officers business.

I see nothing that amount to compulsion. I see nothing that amounts to a significant interference with their liberty. Under all of the totality of the circumstances and the test is the totality of the circumstances test. The questions, therefore, which were asked by the officers were asked and answered pursuant to consent.

I don't find that a reasonable person would find that during the course of the discussion they would not be free to leave. Defendant, therefore, are not in detention, nor were they in custody. And any questions that were asked of them were merely investigative in nature. That being the case of course no Miranda Warnings were required.

At some point because of the information or the inconsistencies in the information received by the officers and the observations of the

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physical demeanor of the defendants. The officer did ask the defendants whether or not the defendants would consent to a search of their person or a search of the bag.

And at this point what occurred was that the defendants took off running, all three of them. One of them, I think it was Officer, excuse me, Defendant Cachola punched Officer Tano and then took off running. Everybody else took off running.

A second or two before they dashed, I believe it was Defendant Galinato, was heard to say, give me a break man, or something like that. And I have heard two things from that. First of all, they all made a break for it at that point. So either that was a signal to run or everybody was watching the first sprinter in the group and when he took off everybody else took off.

In any event, the statement by Galinato in response to a response to frisk and the request whether or not he was carrying any drugs, not a statement made while he was in custody. So if the defendant seeks to suppress that statement the motion is denied in that regard because there was no custodial investigation.

Of course, once the encounter proceeded to the point where the three defendants are dashing down the concourse, the offices then see the defendants take from under some place under their

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clothing and on their body what was eventually discovered to be illicit drugs and fling those items into the potted plants. The officers testified that this occurred in plain view.

And I find that the defendant — the defendants had no reasonable expectations of privacy in items which they pulled from their bodies and in a public area fling them into plants next to the public concourse. The items were in plain view. And the defendants obviously aban-

doned those items at that point.

With regard to the discovery, well, first of all, the next thing that happens, of course, is based upon the probable cause glean from all of the facts I have already stated, the officers arrest of defendants. There is probable cause to believe crime — drug related crime had occurred. And Quino and Galinato certainly can be arrested for flinging what appears to be contraband into the plants. Cachola can be arrested for punching out Officer Tano. And so there's probable cause for his arrest.

The others items which are discovered were discovered as a result of a search incident of a lawful arrest and since the bets were discovered on the body of the defendant or defendants involved. And the officer had seen the items taken from the body of the defendants and flung into the plants.

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And the frisk for the purpose of preserving other evidence of the crime for which they were arrested was proper. And the recovery of the evidence from the body of the defendants fell well within the permission and scope of the search incident for a lawful arrest.

All of the reasons I have stated, the motion to suppress is therefore denied. The State will prepare appropriate findings and conclusions in the order.

(HEARING CONCLUDED.)
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